

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No.

v. : 1:16-cr-10094-LTS

ROSS MCLELLAN, :

Defendant. :

----- x

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

JURY TRIAL  
Day 2

Tuesday, June 5, 2018  
8:33 a.m.

John J. Moakley United States Courthouse  
Courtroom No. 13  
One Courthouse Way  
Boston, Massachusetts

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**P R O C E E D I N G S**

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is June 5th, the case of United States vs. Ross McLellan, criminal action 16-10094 will now appear before this court.

Counsel, please identify themselves.

THE COURT: I see all counsel and Mr. McLellan.

Okay. Everyone is ready? Any issues to talk about?

MR. JOHNSTON: Yeah, we just -- we're going to be moving a bunch of discs into exhibit -- into evidence and we can -- we're going to let the defense know exactly which ones. So hopefully they can all come in at once. If not, we can do them one by one. These are all going to be ones that we covered on the direct examination of Mr. Boomgaardt.

THE COURT: Okay. Have you already gone over which ones?

MR. FRANK: No, we're about to do that.

THE COURT: Okay. Fine. So my view is, if there's no objection to them coming into evidence, I have no problem, like at the beginning of Mr. Boomgaardt -- how do you say his name?

1 MR. JOHNSTON: Boomgaardt.

2 THE COURT: Booomgaardt. Mr. Boomgaardt, just  
3 saying we're moving these in. I'll explain to the jurors  
4 that these are ones coming in without objection. That's  
5 what's happening and so -- to save time, we'll just do it en  
6 masse and then you'll be referring to them at different  
7 points in the examination.

8 That doesn't preclude individual exhibits along the  
9 way at any point coming -- you know, coming up, and offering  
10 them in the ordinary way, and --

11 MR. WEINBERG: Judge, it would certainly be  
12 helpful, it's Tuesday morning, and the Government still has  
13 not advised us, after Mr. Boomgaardt, who the next witnesses  
14 are, so we can officially and economically prepare the rest  
15 of the week. I would ask Your Honor to ask the Government to  
16 advise us who comes after Boomgaardt.

17 MR. FRANK: Your Honor, our -- we're happy to work  
18 cooperatively with the defense and not have -- and be  
19 transparent, but I think that that should then go both ways.  
20 We're happy to tell them the day before witness --  
21 Mr. Boomgaardt is going to be testifying today. He's going  
22 to be testifying all day tomorrow, so we're not going to get  
23 to the next witness until Thursday, but we don't think that  
24 they need eons of advance notice, but we're prepared to do  
25 that if the defense would reciprocate, but we're in a

1 situation where --

2 THE COURT: You mean so they're calling their  
3 witnesses, tell you in a day in advance?

4 MR. FRANK: Well, actually, what I'm referring to  
5 here is the fact that we're three weeks away from their case,  
6 we don't have a realistic witness list. I know Your Honor  
7 says that their list is adequate and that's fine, but if we  
8 are going to be transparent about who we're actually calling  
9 and the sequence and all that stuff, they're not calling 26  
10 witnesses in 3 days and they know that right now.

11 And so if they're going to ask us to be  
12 transparent, we're fully prepared to do that, but then we  
13 would ask for the courtesy of some transparency on the other  
14 side, as well. And tell us which of those witnesses they're  
15 reasonably likely to call. And then they can give us a  
16 heads-up, you know, as we get closer, as to which ones and in  
17 which sequence. But 26 witnesses in 3 days is an actual  
18 impossibility.

19 MR. WEINBERG: First of all, it's 5 days, and  
20 second of all, there will be decisions made responsive to the  
21 evidence. I will provide Mr. Frank the same 48-hour notice  
22 that we're asking for from him.

23 MR. FRANK: Except that I provided a list of actual  
24 witnesses that I intend to call, with *Jencks* for all the  
25 witnesses and that has not been reciprocated by the defense.

1 There's a number of witnesses for whom there's no *Jencks*.  
2 There's a number of reciprocal *Jencks*. And there's -- even  
3 in five days, he's identified more witnesses than our entire  
4 three-week direct case, and it's just not realistic and so  
5 all I'm asking is for reciprocity.

6 MR. WEINBERG: Judge, I'd be happy to give them  
7 *Jencks*, if they would be happy to tell WilmerHale to tell  
8 State Street to have its employees be interviewed. As  
9 opposed to the categorical rejections of our attempts to  
10 interview anybody.

11 MR. FRANK: The witnesses for whom we're requesting  
12 *Jencks* are not even, in several cases, currently employed by  
13 State Street. They know exactly what they're going to say  
14 and they're just not telling us.

15 MR. WEINBERG: Seven of the eight witnesses that  
16 are -- other than experts in reputation, witnesses and  
17 foreign lawyers are State Street or former State Street  
18 employees, many of whom we've been unable to interview. Mr.  
19 Frank has the four depositions from the SEC case. They were  
20 given the information on four of the eight that he's  
21 questioning about, but we're weeks before the defense. We're  
22 not going --

23 You know, if we hadn't given an extensive defense  
24 witness list and instead we're putting new witnesses on the  
25 list, we'd have the reverse complaint that Mr. Frank is being

1 ambushed. Now, we give him a realistic list of the potential  
2 defense witnesses and reciprocally we're denied even the  
3 knowledge of who the witness after Mr. Boomgaardt is.

4 THE COURT: So there are a couple of practical  
5 issues that you people are going to have to work out. The  
6 first is the timing disclosure. Okay. My view of it is  
7 this.

8 One, as a general matter, I think -- I believe in  
9 the principle of relevance. Right? It's the foundation of  
10 the rules of evidence and it's a good guide to figuring out  
11 what other things you should do.

12 The principle of non-relevance that sometimes  
13 applies outside the courtroom arena, where you can have a  
14 particular issue and you can tie it to some totally,  
15 completely unrelated issue doesn't -- it's not impermissible  
16 and you all are free to do that in whatever your negotiations  
17 are, but as a practical matter, it makes sense to take these  
18 issues one by one, it seems to me. You're going to work them  
19 out yourselves. You can give him 48 hours' notice if you  
20 wish. I'm not ordering you to give him 48 hours' notice.

21 What I'm telling both of you, as a general matter,  
22 is what I said -- I meant everything I said to the jury  
23 yesterday, including that I intend to explain to them the  
24 process as it goes on. I take that seriously. I try to  
25 explain to them. I'll explain to them why there's not



1 leading questions on direct, as a general matter, with the  
2 exceptions, and why there's leading questions on cross, and  
3 things like that. Some of them are mostly fairly innocuous,  
4 and the like.

5 The problem you run if you don't give notice is  
6 that if you don't give notice and he needs more time to  
7 prepare, I'll give him more time to prepare. And depending  
8 on what I think about it, I may just say, like, you know, we  
9 need to take a break to give people time to prepare. And if  
10 I thought it was reasonable, that's all I'll say. But if I  
11 feel like notice should have been given, I'm not afraid to  
12 say to the jurors that the Government could have given notice  
13 and didn't and that's why they need time and that's why we're  
14 taking a break.

15 Now, on the first instance, I'm not threatening you  
16 with that, I don't mean it that way. I'm not doing that  
17 automatically. But my advice to all of you is be practical.  
18 This is a long case. These are very important issues to the  
19 Government. It's very important issues to Mr. McLellan.  
20 There's really no good reason why either of you shouldn't be  
21 given 48 hours' notice.

22 As to his witness list, as unhappy as you are about  
23 not having *Jencks*, I haven't seen a whiff that there's *Jencks*  
24 that he has that he hasn't given you. He doesn't have it.

25 MR. FRANK: Well, there's no way for me to prove

1       that, Judge --

2               THE COURT: I understand that. You're in the  
3 position -- he often -- not he particularly, but defense  
4 counsel will complain to me that the Government hasn't given  
5 us *Jencks* on this or that person, and they'll say that's all  
6 the *Jencks* that we have. And I accept that, because I  
7 accept -- in other words, unless you have a basis to show me  
8 he's being dishonest, which there isn't, and you're not  
9 alleging --

10              MR. FRANK: I have the highest respect for counsel  
11 and I would never suggest that and I don't believe that. But  
12 he does have -- he could give me a proffer of what he expects  
13 the witnesses to say, why he's calling them.

14              THE COURT: Right.

15              MR. FRANK: These are witnesses that in some cases  
16 appear entirely irrelevant to this case. And if I have a  
17 relevance objection, I can't even make it until they start  
18 talking, by which point the cat is out of the bag.

19              THE COURT: Right, but they're not talking today.  
20 Seven of the witnesses are character witnesses. You know, as  
21 well as I do, that he has a big decision to make about  
22 character evidence.

23              MR. FRANK: And I'm not objecting to the character  
24 witnesses, Your Honor.

25              THE COURT: Right, but so you take them out. And

1 then there's the experts, which you have their reports, and  
2 then there's the three lawyers, you have their depositions.  
3 And you know the three lawyers aren't talking to him, so he  
4 knows what he knows through the deposition and he knows from  
5 what he knows from the documents, which are available to you.  
6 And he knows what he knows from his client, which is not  
7 available to you.

8 MR. FRANK: We're talking about several witnesses,  
9 Judge, who are on his list, who are not State Street  
10 employees, or in some cases who are and who don't appear to  
11 have any relevance to this case.

12 THE COURT: But that's not 26 anymore. Now, we're  
13 down to how many?

14 MR. FRANK: Well, the 26 -- the issue with the 26,  
15 Judge, is that, for example, he's got four experts. Is he  
16 really going to be putting on four experts, is he only  
17 planning to put on one, two, three of those experts. I mean,  
18 there has to be some reciprocity here.

19 For example, just to give the Court another  
20 example. We disclosed our exhibit list a month ago. We  
21 disclosed two dozen audio exhibits that we intend to  
22 introduce six weeks ago. Counsel has refused to tell us  
23 which of the exhibits they object to, unless we tell them  
24 witness by witness which of those exhibits we're putting in  
25 and what sequence. And that's just not reciprocity, Judge.

1           That's asking us, at the same time that they're  
2     arguing to the court that they should be able to surprise us  
3     with audio exhibits that they fully intend to use on cross  
4     examination. And the Court is going to give a neutral  
5     explanation to the jury if we need additional time. And yet  
6     I'm being told that we're going to get a nonneutral  
7     explanation if he needs additional time for exhibits that  
8     I've actually identified.

9           THE COURT: No, what I told you yesterday --  
10    actually, that's not quite right. What I told you yesterday  
11    was in the first instance, I was going to give a neutral  
12    explanation. If I feel like you're asking for unreasonable  
13    amounts of time that you don't need, or I feel like he's  
14    being unreasonable and not identifying the thing, then I will  
15    consider a nonneutral explanation. And that might not be the  
16    first time around, that might be later in the case. So if --  
17    and that applies to anything. And my goal in this is not to  
18    give nonneutral explanations to the jury. My goal in the  
19    first instance is to let you each try your case. But if I  
20    feel like people are wasting time, then that's a different  
21    thing.

22           With respect to the exhibits, you don't have to --  
23    he's not telling you -- he's saying to you, essentially, a  
24    time principle. Like if you want to know which ones we're  
25    going to object to, this is what it is, he's saying I want to

1 know which witnesses you're going to use him. You don't have  
2 to tell him with that. I'm not ordering you to -- you can  
3 put in your exhibits like, okay, these are the ones we're  
4 going to use today. And you can put them in en masse, or if  
5 you want to hold back and put in one by one, you can do them  
6 one by one, and that's fine. I'm not going to --

7 I mean, I encourage all of you to be practical,  
8 because it strikes me that this case, I could be wrong, but  
9 this case is more about -- there's not so much -- this is  
10 more of a state of mind and an interpretation and  
11 characterization case. This isn't really a dispute about  
12 whether the light was red or green.

13 MR. FRANK: Agreed.

14 THE COURT: And so in that sense, you know, you  
15 should stay focused on what the issues are. But, you know,  
16 we'll take it one step at a time. I think you probably want  
17 to take a couple minutes to talk to each other about that and  
18 I want to raise one other issue with you, but yes.

19 MR. WEINBERG: We have one other issue, Your Honor,  
20 which addresses a motion to -- we served a subpoena on State  
21 Street for e-mails between the dates of November 2 --

22 THE COURT: Is this the pending motion to compel or  
23 something else?

24 MR. WEINBERG: This is yet another --

25 THE COURT: All right.

1 MR. WEINBERG: We served a trial subpoena for  
2 e-mails between November 2 and 4, 2010, which is squarely  
3 within the subject matter waiver. State Street used these  
4 e-mails, waived the privilege, and proactively relied upon  
5 them to make the arguments they made that resolved their  
6 matters.

7 THE COURT: And what's the issue about the  
8 subpoena?

9 MR. WEINBERG: We now have an assertion of  
10 privilege as to e-mails, some of which have never been  
11 disclosed to us. And I presume, therefore, not disclosed to  
12 the Government, that come within this period that are  
13 relevant, that talk about requests by Mr. McLellan for legal  
14 advice from Ms. McCay, who is the US Attorney at State  
15 Street. You know, we are concerned that we understood --

16 THE COURT: The attorney in the United States, not  
17 the --

18 MR. WEINBERG: State Street's legal advisor.

19 THE COURT: Not that the US Attorney's Office put  
20 an AUSA and --

21 MR. FRANK: I believe that is part of Mr. Weinberg's  
22 theory, but that's --

23 THE COURT: And that's not the --

24 MR. WEINBERG: So one, we operated and I expect the  
25 Government operated under the belief that all of the e-mails

1 that were relevant to KIA 121 that had been within the  
2 subject matter waiver had been disclosed to the FCA, through  
3 the FCA, to Mr. Frank, and from Mr. Frank to me.

4 THE COURT: Short version, you want me to order  
5 something?

6 MR. WEINBERG: I want you to order State Street on  
7 the very short notice to justify the assertion of privilege  
8 as to the e-mails that come between November 2 and 4, and in  
9 particular a set of e-mails that we've never seen.

10 THE COURT: What is -- I could either order them to  
11 file like an explanation, or should I have a status  
12 conference this afternoon, like just with counsel, the three  
13 of you, and sort of see what the issue is and talk about  
14 timing or what have you.

15 MR. WEINBERG: I would ask Your Honor to order them  
16 by the end of the day to justify their assertion of  
17 privilege, given the subject matter waiver, and given Your  
18 Honor's order to Document 273, which, at footnote 9,  
19 essentially, finds a waiver and puts the burden on State  
20 Street to identify any documents that they --

21 THE COURT: Have they given you a log?

22 MR. WEINBERG: They've given us a log.

23 THE COURT: I think I should -- I'm not sure how  
24 much -- if I issue an order at 9:00 a.m. and say they have to  
25 respond by 5:00, what I'm really going to get. Why not have

1 a hearing this afternoon?

2 MR. WEINBERG: Two reasons. One is the practical,  
3 which is that I'm going to be preparing to cross-examine  
4 Mr. Boomgaardt, and second, these are not e-mails that are  
5 relevant to Mr. Boomgaardt. So if Your Honor --

6 THE COURT: So you just want me to say explain the  
7 basis for having privilege in light of prior -- prior waivers  
8 by State Street?

9 MR. WEINBERG: Yes. And on whatever time schedule,  
10 you know, short time schedule Your Honor thinks is  
11 appropriate. I'm glad to argue this tomorrow afternoon or  
12 Thursday afternoon.

13 THE COURT: Okay.

14 MR. WEINBERG: Thursday afternoon being preferable,  
15 given the Boomgaardt.

16 THE COURT: Also, one juror, Juror Number 49, why  
17 don't you --

18 Maria, show this to counsel.

19 (Discussion off the record.)

20 THE COURT: Does counsel think I should talk to  
21 this juror? I think I should.

22 MR. WEINBERG: Yes, Your Honor.

23 THE COURT: Do you think I should do that -- just  
24 at sidebar is fine?

25 MR. FRANK: I think that's fine, Your Honor.



1 THE COURT: All right.

2 Maria, would you get that juror?

3 MR. WEINBERG: Judge, while we're waiting for the  
4 juror, there's one other preliminary matter. We ordered the  
5 transcript of Mr. Pennings' Rule 11. We received the  
6 unsealed portion of the transcript. Now, I would ask the  
7 Court, given the status of the case --

8 THE COURT: Any reason he shouldn't be able to get?

9 MR. FRANK: Absolutely not.

10 THE COURT: So I order the seal is in place, but  
11 defense counsel may obtain the entire sealed and unsealed  
12 portions.

13 MR. WEINBERG: Thank you very much.

14 (Discussion off the record.)

15 THE COURT: Bring the juror over to sidebar.

16 (The following discussion held at the bench.)

17 THE JUROR: Good morning.

18 THE COURT: How are you doing?

19 THE JUROR: Sorry to bring this bad news to you.

20 THE COURT: That's okay. So just for the record,  
21 you're Juror No. 49?

22 THE JUROR: Yeah.

23 THE COURT: Okay. So you told Ms. Simeone there  
24 was an issue about getting compensated from your job or  
25 something. Just tell me what the problem is.

1 THE JUROR: Well, I just recently was employed by  
2 this employer and I had been there eight months, so I was  
3 under the assumption that I would be able to be paid and I  
4 talked to them before giving them the notice and it seemed  
5 like it was fine. But I called them yesterday, because I was  
6 picked and selected. And he goes, well, I was trying to  
7 contract HR, because until you get the year mark, I wouldn't  
8 get compensated for the whole time.

9 THE COURT: So what's the status, what did you  
10 learn? You'll get paid for how much, if at all?

11 THE JUROR: Just what I would get paid here.

12 THE COURT: Oh, so you wouldn't get paid from your  
13 jobs. And just remind me, I apologize that I don't recall.  
14 What do you do?

15 THE JUROR: I'm a diesel mechanic.

16 THE COURT: Oh, you're a diesel mechanic. That's  
17 right. And you've been there eight months?

18 THE JUROR: Yeah.

19 THE COURT: Okay. And so bottom line is, if you  
20 serve on the jury for this case, then you will get paid what  
21 we pay you, the \$50 a day, but you'll get nothing from your  
22 job?

23 THE JUROR: Yeah.

24 THE COURT: And how much do you make from work?

25 THE JUROR: I take home about \$800 a week and I've

1       been paying school loans and car insurance and --

2               THE COURT: All right. Do you have any questions  
3 about that?

4               MR. GOLDSTEIN: No.

5               THE COURT: Do you have any questions about that?

6               MR. FRANK: No.

7               THE COURT: Why don't you just take a seat in the  
8 jury box.

9               THE JUROR: The chairs right over there?

10              THE COURT: Yeah, and we'll talk to counsel for a  
11 minute.

12              MR. WEINBERG: I wonder whether the Court could  
13 make a request of the employer to --

14              THE COURT: Waive the rule.

15              MR. WEINBERG: They are internal rules to pay him.

16              MR. FRANK: That's what I was thinking. I believe  
17 he's an alternate.

18              THE COURT: He's an alternate?

19              MR. JOHNSTON: Yeah.

20              THE COURT: Okay. Sir, why don't you come back for  
21 a second?

22              So this is what I think I'm going to do, if it  
23 doesn't cause a problem for you. I'm going to have you stay  
24 today.

25              THE JUROR: Okay.

1 THE COURT: We're going to call your employer, if  
2 that's okay. If you provide Ms. Simeone the information,  
3 we're going to ask your employer to pay you.

4 THE JUROR: Okay.

5 THE COURT: And if they agree, then you'd be all  
6 set, right?

7 THE JUROR: Yeah.

8 THE COURT: Okay. And if they don't, then I'll  
9 talk to you again and see if we can work this out for you.

10 THE JUROR: Okay. That sounds fair.

11 THE COURT: Okay.

12 THE JUROR: Awesome.

13 THE COURT: So Maria, come on over for one second.  
14 Two things. Ask this juror to give you the name of his  
15 employer and the contact information, and then I'm going to  
16 want you to call them. I'll explain to you exactly what I  
17 want you to say, but the gist is to call them to ask them  
18 to -- they have a rule that you don't get paid for jury  
19 service until you've been there a year. He's been there  
20 eight months and I want them to make an exception for him.

21 THE DEPUTY CLERK: Okay. You want me to ask them  
22 that?

23 THE COURT: That's what we're going to do, but you  
24 and I will talk about that. So get that information from him  
25 and then you can take him back to the jury room.

1 THE DEPUTY CLERK: Okay.

2 THE COURT: And I'll get back to -- and give your  
3 contact information to Maria, too, so that if we don't have  
4 an answer by 1 o'clock, we can reach out to you in the  
5 afternoon and let you know.

6 THE JUROR: All right. Thank you.

7 THE COURT: Okay. Once we know what the answer on  
8 that is, then we'll see where we are.

9 MR. WEINBERG: Okay.

10 MR. FRANK: Thank you, Your Honor.

11 MR. WEINBERG: Thank you, Judge.

12 (Bench conference concluded.)

13 MR. FRANK: Your Honor, one additional issue. It's  
14 my understanding that the defense has chalks that it's going  
15 to be using during the opening. We haven't been given an  
16 opportunity to see those. We've provided ours. Counsel has  
17 indicated he'll provide them to me to look at after I open,  
18 so we'd ask for a recess, so that I can take a look at those  
19 chalks.

20 MR. WEINBERG: We agree.

21 THE COURT: Fine.

22 (Discussion off the record.)

23 MR. JOHNSTON: Your Honor, this is for something  
24 when we're actually doing the direct examination, but because  
25 the -- a number of audio recordings will be played during the

1 direct examination, we've prepared binders of transcripts.  
2 Do you want them distributed to the Court and the jurors when  
3 the audio is played, or do you want it like under their  
4 seats?

5 THE COURT: So you have -- just give me an -- are  
6 we talking one or --

7 MR. JOHNSTON: No, so there are -- for the entire  
8 examination, there's approximately 10 or 12 calls. Today  
9 we'll maybe get through five of them. And so they're all  
10 in -- we've -- we have about --

11 THE COURT: You have a tabbed notebook, basically.

12 MR. JOHNSTON: Yeah, they're tabbed notebooks, by  
13 exhibit number.

14 THE COURT: I think the simplest thing to do is  
15 when you reach the first phone call, then we'll distribute  
16 them to the jurors, and they'll have them. And they have all  
17 ten calls in them and I'll explain to them that these are  
18 calls. They're transcripts and you'll refer to them like  
19 this is call one or call eight, or however they're tabbed, so  
20 they'll know where to turn. And then they'll have all of  
21 them for all of the calls.

22 MR. JOHNSTON: Okay. All right.

23 THE COURT: That sounds good. And we'll just do it  
24 when we get to the first one.

25 MR. JOHNSTON: And one other matter that I wanted

1 to raise with the Court. We believe we need until Friday to  
2 respond to all of -- file our objections to the jury  
3 instructions.

4 THE COURT: No problem. I was thinking Friday and  
5 I admired your eagerness.

6 MR. JOHNSTON: I was a little overoptimistic.

7 THE COURT: That's fine.

8 MR. JOHNSTON: Given all of the objections that  
9 need to be raised.

10 (Discussion off the record.)

11 THE COURT: Okay. So when Ms. Simeone was back  
12 there before, we did not have all the jurors.

13 Mr. Frank, the transcripts with respect to the  
14 audio tapes, are you offering them into evidence, or are you  
15 using them just as chalks?

16 MR. FRANK: We're just using them as an aid, Your  
17 Honor. We don't believe they should come into evidence.  
18 Counsel has indicated to me that he does not have an  
19 objection to any of the audio, so we would ask for the  
20 Court's permission to move that in in bulk. Just that --  
21 the --

22 THE COURT: Yes. I think you should do that in  
23 front of the jury, though, either before you call Boomgaardt,  
24 or right when he takes -- whenever a convenient time for you,  
25 if you wish to do it.

1 THE DEPUTY CLERK: We're just missing two.

2 THE COURT: You have 14.

3 MR. WEINBERG: Judge, do you mind if we take about  
4 a two-minute break?

5 THE COURT: A quick men's room break?

6 MR. WEINBERG: Yeah.

7 THE COURT: Yeah. Go quickly.

8 (Pause.)

9 (The jury enters the courtroom.)

10 THE COURT: Good morning, ladies and gentlemen.

11 Did everybody follow my instruction, no independent research,  
12 don't discuss the case among yourselves, or with anyone else?

13 Okay. So I know it's -- this is downtown Boston.  
14 It's not always an easy place to get to, especially if you're  
15 coming from afar and especially on the first and second day.  
16 So it happens, but do your best to, once you figured out how  
17 to get here in a convenient and timely way to do that and try  
18 to arrange your schedule so you can get here in time, because  
19 we can't begin unless we have all of you and all the lawyers  
20 and all the court staff. So that just helps us keep moving  
21 promptly and efficiently.

22 As I told you yesterday, we're going to begin this  
23 morning with opening statements. Opening statements are not  
24 evidence. They are an outline of what the lawyer expects the  
25 evidence to be. They're a helpful guide for you at the



1 beginning of the case, to understand what's coming. And so  
2 we begin with the Government's opening statement.

3 MR. FRANK: Thank you, Your Honor.

4 **OPENING STATEMENTS BY THE PLAINTIFF**

5 MR. FRANK: In 2010 and 2011, the defendant, Ross  
6 McLellan, was a senior executive at State Street Corporation,  
7 one of the biggest banks in the world, based right here in  
8 Boston. He led a group that provided services to pension  
9 funds and other large institutional investors, investors with  
10 billions of dollars under management. Often, for the benefit  
11 of individuals, like retired postal workers, or supermarket  
12 employees.

13 In 2009, that group had one of the best years in  
14 its history. But in 2010, more banks were getting into the  
15 business. And in one key region, several of State Street's  
16 competitors were undercutting it on price, offering to do the  
17 same work for cheaper, prices State Street couldn't match.

18 How did the defendant respond? At his direction,  
19 State Street began secretly overcharging its clients, adding  
20 hidden commissions to billions of dollars' worth of trading  
21 in stocks and bonds, commissions that added up to millions of  
22 dollars the clients didn't know they were being charged.  
23 They promised clients low fees and they promised to act in  
24 the client's best interest, to put the client's interest  
25 ahead of the bank's own interests.

1           But that is not what they did. Instead, they  
2 secretly tacked on hidden fees, fees that the clients  
3 couldn't see. They promised one price and they secretly  
4 charged another. And they did it at the direction of this  
5 man, the defendant, Ross McLellan. They lied to separate  
6 clients from their money. That's a crime. It's called  
7 fraud, and it's what brings us here today.

8           Good morning, again, ladies and gentlemen. I'd  
9 like to reintroduce myself. My name is Stephen Frank, I'm an  
10 assistant United States Attorney here in the district of  
11 Massachusetts. Together with my colleague, William Johnston,  
12 and Heather Leahy, a paralegal with the US Attorney's Office,  
13 we represent the United States. It's our job to present to  
14 you the evidence that proves beyond a reasonable doubt that  
15 the defendant did exactly what he's charged with doing,  
16 cheating State Street's clients and violating the federal  
17 securities fraud, wire fraud, and conspiracy laws in the  
18 process.

19           Now, as you'll learn, the defendant ran a worldwide  
20 group at State Street. It was called Portfolio Solutions.  
21 It had several different functions, but the biggest was  
22 called "Transition Management." You are going to learn a lot  
23 about Transition Management over the next few weeks. But  
24 basically, it's about helping large institutional investors,  
25 like pension funds, move their money from one place to

1 another place, or to restructure their investments, and doing  
2 it as cheaply and as efficiently as possible.

3 For example, if you're a large pension fund and  
4 you're responsible for managing the retirement savings of  
5 thousands of individual employees, you might have money,  
6 billions of dollars, with all sorts of different money  
7 managers. And they invest it for you, in a wide variety of  
8 different stocks and bonds. You might decide that you're not  
9 happy with the performance of one of your managers, or you  
10 just want to make a change in your portfolio, your  
11 investments for some other reason, like to reallocate those  
12 assets. And that requires you to move your money to a  
13 different manager, or a different set of investments.

14 To do that, you need to sell the stocks and bonds  
15 that you have over here and buy the stocks and bonds that the  
16 new manager wants to invest in. You might think about it as  
17 a little bit like switching banks, only it's a lot more  
18 complicated than that. And when you have billions of dollars  
19 invested in all sorts of different stocks and bonds, it can  
20 get very, very complicated.

21 Transitioning those investments, getting out of  
22 these stocks and bonds, and into these stocks and bonds, and  
23 doing it quickly, efficiently, and at the lowest cost.  
24 That's the business of transition management. And the unit  
25 that the defendant ran at State Street was a major provider

1 of that service all around the world.

2 In 2009, the defendant's group had one of its best  
3 years ever. You might remember that that was just after the  
4 financial crisis, when the markets had been very, very  
5 volatile, bouncing up and down. But as the stock and the  
6 bond markets gradually settled down, lots of pension funds  
7 and other big investors who had been waiting to move their  
8 money around decided that now was the time. For the  
9 defendant's group, that meant a lot of business, a lot of  
10 opportunity and it translated into great results that year.

11 But as the new year began in 2010, that trend  
12 started to reverse. There was less money moving around and  
13 more competitors started to get into the business. That  
14 meant that it was going to be tough for the defendant's unit  
15 to repeat the performance that it had in 2009. And you'll  
16 learn that his goal wasn't just to repeat that performance,  
17 it was to do better.

18 And there was another issue. Not only was there  
19 more competition, but prices were dropping. Now, that was  
20 especially true in Europe, the Middle East, and Africa. At  
21 State Street, they call it EMEA for short.

22 State Street's operations for that region were  
23 based in London. The head of Portfolio Solutions for the  
24 EMEA region was a man named Edward Pennings. He reported  
25 directly to Ross McLellan, who was the global director of

1 that group. The head of transition management for EMEA was a  
2 man named Richard or Rick Boomgaardt. He reported to  
3 Mr. Pennings.

4 Now, you will learn that the standard way that  
5 banks like State Street charge for transition management is  
6 by the trade. It's a per trade charge. It's usually called  
7 a commission. Sometimes, depending on whether you're talking  
8 about stocks or bonds, it can be referred to by different  
9 words, a markup, or sometimes a markdown, or a spread.

10 Because instead of adding a separate commission of a few  
11 pennies per share, you actually mark up the price of the bond  
12 by that amount. But each of those terms refers to a charge  
13 per trade. And you will learn that at State Street, those  
14 terms were often used interchangeably. In fact, most of the  
15 time they just used the word "commission."

16 Usually, those per trade charges are measured in  
17 pennies. Sometimes they're measured in something called  
18 basis points. Now, that's just industry jargon, but really  
19 what it is, it just refers to a tiny percentage -- a tiny  
20 percentage of 1/100th of a percentage point. So if you were  
21 to trade a bond and the bond is worth \$100, one basis point  
22 is just one penny. Now, that might not sound like a lot of  
23 money, but when you're buying and selling billions of  
24 dollars' worth of stocks and bonds, individual pennies can  
25 add up very fast. And you will learn that in this case, they

1 added up to millions of dollars.

2 In 2010, State Street's competitors in Europe were  
3 offering lower and lower commissions to win transition  
4 management signups. A few banks even offered to charge zero,  
5 no commission. Some did that just to win a share of the  
6 business, to get clients in the door, hoping to get market  
7 share or to make money from those clients in other ways. For  
8 example, instead of charging commissions for trying to find  
9 someone else to buy the client's shares, some banks -- which  
10 was what State Street did -- some banks might just buy the  
11 shares themselves, hoping that later on, they could sell  
12 those same shares for a higher price, or not.

13 And some competitors had a reputation in the market  
14 for playing dirty, for promising low prices, and then tacking  
15 on additional hidden commissions that the clients couldn't  
16 see. But State Street promised a different approach. In  
17 London, the defendant's team, Mr. Pennings and  
18 Mr. Boomgaardt, told clients that they weren't like those  
19 other competitors. In fact, they put those promises in  
20 writing.

21 They competed on price, as well, but they also  
22 promised to act in their client's best interest, to act as  
23 their agent, and to represent them in getting the best price  
24 for their stocks and their bonds. They used this word:  
25 "Fiduciary." That's a legal term, but State Street actually

1 explains to clients what it meant. Putting client's interest  
2 first, ahead of the bank's own interest.

3 Pay us an agreed-upon fee, they said, and we'll go  
4 out and get you the best deal that we can find for your  
5 stocks and bonds, and pass it right along to you. That's  
6 what they promised. But as you'll learn, that's not what  
7 they did.

8 Instead, once they succeeded in luring clients in  
9 with a low price and a promise to put the client's interest  
10 first, they did exactly the opposite. They tacked on secret  
11 commissions that the clients couldn't see, money that they  
12 didn't know had been picked right out of their pockets.  
13 That's not putting clients first. That's fraud.

14 Who was behind this scheme? The defendant, Ross  
15 McLellan. He was the boss. He gave the directions. He  
16 ordered the lies. In fact, you will learn that when the  
17 defendant saw how well the scheme was working with Pennings  
18 and Boomgaardt in Europe, he decided to try it out right here  
19 at home, on a major insurance client based in New York. He  
20 overcharged that company alone by close to \$1 million. And  
21 when the jig was up, it was the defendant who ordered the  
22 coverup.

23 Over the course of the next few weeks, you will  
24 learn about transition management assignments involving six  
25 different clients in Europe and the Middle East. There's

1 KIA, it's the Kuwait Investment Authority. It's a Government  
2 fund in the country of Kuwait. There's a pension fund in the  
3 Netherlands that has a very complicated name, which I'm not  
4 going to try and say to you, we're going to call it Dutch  
5 Doctors. There were two pension funds in England. One was  
6 the Royal Mail. That is the equivalent of the postal  
7 service. It manages the retirement savings of postal  
8 workers. And there was another one, Sainsbury's. That  
9 managed the retirement savings of thousands of employees of a  
10 large supermarket chain in England called Sainsbury's.

11 And there was two funds in Ireland. One was this  
12 one, Eircom. That's a phone company in Ireland. They  
13 managed a retirement savings of people that worked in the  
14 phone company. And then there was one that has a very  
15 complicated name in Gaelic, which I'm not going to try and  
16 say, but it's called National Treasury Management Agency in  
17 English, or NTMA. You'll also hear about an assignment for  
18 that US insurance company that I mentioned, it's called AXA  
19 Equitable Life Insurance Company.

20 You will learn that some of those clients were  
21 fairly sophisticated investors and some were not, but all of  
22 them trusted State Street. They all believed the  
23 representations that the defendant's people made to them.  
24 And in each case, the defendant and his co-conspirators took  
25 advantage of that trust and broke that trust.



1           So let me tell you a little bit about how this  
2 scheme worked. For each of those clients, State Street  
3 promised a low fee for transition management services. Now,  
4 in the case of KIA, which was one of the bank's largest  
5 clients across the bank, they told clients that they would  
6 charge zero comission for transition assignments. In the  
7 case of Dutch Doctors and AXA, they offered a low commission  
8 rate. In the case of NTMA and Sainsbury's and Royal Mail and  
9 Eircom, they promised a flat fee.

10           That is, instead of a per trade commission, they  
11 said they would charge a fixed price, no matter how much  
12 trading, no matter how much buying and selling of stocks and  
13 bonds was involved. For example, here's an e-mail in which  
14 Pennings tells the defendant about an opportunity to bid on a  
15 transition for Royal Mail. He forwards the e-mail from Royal  
16 Mail asking for them to bid and he says confidential, but  
17 check this baby out, gotta win this one.

18           And here's the defendant's response. Thin to win.

19           Defendant is a golfer. That's a golf expression  
20 apparently. And it means bid low so that we can win the  
21 deal.

22           But they didn't just promise a low price. They  
23 also offered to be their client's agent. To help their  
24 client get the best price for those stocks and bonds. And  
25 they promised to be their fiduciary, to put their clients'

1 interests first.

2 Over the course of this trial, we are going to show  
3 you the promises that they made. Here's an example of what  
4 State Street promised to do for Royal Mail. In our fiduciary  
5 role, we always act as agents to the client. Contractually,  
6 we have to put our client's interest ahead of our own. We  
7 assure clients. We act in their best interest by aligning  
8 our interest with theirs.

9 And here's that thin price that they promised, a  
10 flat management fee of 1.75 basis points, that's  
11 0.0175 percent, on the value of the legacy assets. Those are  
12 the assets that are being moved from point A to point B.

13 Here's what they promised to do for NTMA. State  
14 Street will act as a fiduciary of the portfolio for the  
15 entire transition period. In our fiduciary role, we always  
16 act as agent to the client. And here's what they promised to  
17 charge. We propose to charge zero commission on all trading  
18 activity. We propose to charge a management fee of  
19 1.25 basis points. That is, 0.0125 percent on the assets  
20 entering transition.

21 You'll learn that in the case of NTMA, they  
22 ultimately agreed with the client on a slightly higher rate,  
23 1.65 basis points, when the size of the deal got smaller.  
24 They only were awarded part of that deal.

25 Here's an example of what they promised to do for

1 AXA. Our unique fiduciary role throughout the entire  
2 transition period provides clients with the comfort that all  
3 conflicts of interest are avoided and allows us to focus our  
4 efforts on managing each transition as a partner in the best  
5 interests of our client.

6 And here's how they promised to charge. Consistent  
7 with our market leading fiduciary-agency business model, our  
8 commissions are fully disclosed to our clients around any  
9 transition events undertaken. State Street's commission  
10 revenues are made up of fully disclosed equity commissions --  
11 that's stocked commissions -- fixed income commissions --  
12 that's bond commissions -- and future contract commissions.

13 But you will learn that State Street didn't  
14 actually charge the low rates that it promised and its  
15 commissions were not fully disclosed. Instead, once the bank  
16 won those assignments, they added secret commissions to each  
17 and every one of those deals. And they did it with the  
18 defendant's approval and often on his direct orders.

19 For example, remember that promise to Royal Mail  
20 that we talked about a moment ago, to charge a flat fee of  
21 1.75 basis points instead of commissions? Here's the e-mail  
22 where Pennings tells Royal Mail, that even though Royal Mail  
23 has cut the deal size, there's going to be less things  
24 involved, State Street will still do it for that price. I  
25 confirm that even though the value is significantly less, we

1 can do this project for a management fee of 1.75 basis points  
2 of the portfolio value of 1.3 billion pounds or  
3 227,500 pounds.

4 Remember what the defendant told him, thin to win.

5 But as soon as they did win the deal, with that  
6 promise, Pennings forwarded the e-mail to the defendant and  
7 he said who's the daddy? Happy President's Day.

8 And then look at what he says next. I'm thinking  
9 1.5 to BPY. You will learn that "BPY" stands for basis  
10 points of yield. That's an extra hidden commission, on top  
11 of this flat fee that he's just promised the client. And you  
12 will learn that that is exactly what they did.

13 At the defendant's instruction, they charged Royal  
14 Mail an extra basis point of yield on trades in the United  
15 States, and an extra two basis points of yield on trades in  
16 Europe and they hid those extra commissions from the client.  
17 Those tiny, little charges on each and every trade translates  
18 into \$3 million of hidden commissions that were charged to  
19 Royal Mail, for a trade that Royal Mail thought was costing  
20 it 227,500 pounds. That's a little less than \$400,000.  
21 That's not putting client interest first. That's fraud.

22 And remember that promise to do the transition for  
23 NTMA for a flat fee? Here's the defendant's e-mail to Royal  
24 Mail telling you that they won that deal for 1.75 basis  
25 points. And then look what he says next. Need to be very

1 creative. And how did the defendant respond? We will.

2 Over the next few days and weeks, you will learn  
3 exactly what these men meant by being creative, charging  
4 hidden commissions on top of what they promised to charge,  
5 being creative by adding secret commissions is not acting in  
6 a client's best interest; it's fraud.

7 Remember KIA, the client that they promised to  
8 charge zero commissions? There were actually two transitions  
9 that State Street promised to do for KIA at that rate.  
10 Here's -- Pennings has just sent an e-mail to McLellan,  
11 telling him that one of those deals is about to happen next  
12 week. And McLellan responds, awesome. Five million? That's  
13 \$5 million. Pennings replies, aiming for that. And then he  
14 says, gonna have to be creative and need you involved on the  
15 FI trading desk. That's the fixed income bond trading desk,  
16 in the US, to ensure that they do as we want.

17 And you will learn that the defendant and the  
18 co-conspirators were creative, as to how they tacked on those  
19 commissions so the clients wouldn't see them.

20 In the course of this trial, you're going to learn  
21 a lot about how stocks and bonds trade, perhaps more than you  
22 ever wanted to know, and about how their prices are recorded,  
23 and about a lot of other complicated concepts. The witnesses  
24 will explain everything that you need to know along the way.

25 But here's a key point. In the stock market, you

1 can usually look up the price at which stocks trade every  
2 day. You can look it up in the newspaper, you can look it up  
3 online. And usually when a broker buys a stock for you, he  
4 needs to break out the price that he paid and what he's  
5 charging you as a commission. But for bonds, it's different.  
6 Bonds don't trade on a central exchange. They trade in a lot  
7 of different places. It's called over the counter. It's all  
8 over the place.

9 And when a broker buys a bond for you, the custom  
10 is that he only gives you a single price. It's called the  
11 net price. That price includes the broker's commission.  
12 That's why it's sometimes called a markup or a spread,  
13 because they actually mark up the price of the bond by that  
14 amount, or when they're selling, they mark down the price of  
15 the bond by that amount, but it's included in the price. And  
16 that makes it easier to hide when you're adding extra  
17 commissions, because the client has to take it on faith that  
18 this net price includes the rate that you've agreed upon.

19 And State Street's clients did take it on faith.  
20 They trusted the bank. And the defendant knew that. And he  
21 took advantage of that trust.

22 Most of the deals that we're going to talk about  
23 were bond deals, because it was easier for the defendant and  
24 his co-conspirators to include hidden commissions in the net  
25 price of those bonds. And that's why it was very hard and in

1 some cases impossible for the victims in this case to learn  
2 that they had been overcharged. But you will learn that the  
3 defendant and his co-conspirators also figured out a way to  
4 pull off their scheme for stocks and that's what they did  
5 with the NTMA, the Irish government fund, and that's another  
6 way that they got creative.

7 Take a look at this e-mail from Pennings to the  
8 defendant about that deal. They received a request for a bid  
9 and Pennings writes, how about a 1 basis point management  
10 fee, or something of that nature, and no commissions and then  
11 take a spread? That's just another word for commission.

12 And then he suggests -- and this is how the  
13 defendant responds. Agree with a zero commission bid. Ian  
14 will need to trade net. Ian is the head of trading in  
15 Europe.

16 Trade net. That means trade the stocks in a way  
17 that the commission is not broken out, so that it's wrapped  
18 up and included in the price, so that the client can't see.

19 And what does Pennings say? Great minds think  
20 alike. We have to charge a fee, then otherwise they get  
21 suspicious.

22 You're going to hear about other examples of what  
23 the defendant did. You'll hear that in June of 2010, he was  
24 visiting London during the first of those trades for KIA.  
25 While he was there, he directed his bond traders in Boston to

1 send him their trading results, as well as the high prices to  
2 which those same bonds traded during the course of the day.  
3 And then this senior executive actually sat down on the  
4 trading desk and he personally figured out how many pennies  
5 he could add to each and every one of those bond trades to  
6 get the prices right up around that high market price.

7 That way, if the client ever looked, if it was ever  
8 able to find those prices and looked, there was less of a  
9 chance that the client would notice that there was a hidden  
10 commission included, because it would look like State Street  
11 did all the trades right around the prices that the bonds  
12 actually traded on that day, even though in reality, State  
13 Street had paid much less for those bonds.

14 On the Royal Mail transition, the defendant  
15 personally directed a junior bond trader to disregard the  
16 written trading instructions that he received, which told him  
17 to charge zero commission, because Royal Mail had agreed to a  
18 flat fee. Instead, the defendant told that trader to apply  
19 commission of 1 basis point of yield to every single trade.  
20 And then he instructed that same trader to hide those  
21 commissions, when he was sending over the trading results to  
22 a colleague in London, who was responsible for reporting  
23 them.

24 On the AXA transition, the defendant also  
25 personally instructed traders to disregard the written



1 trading instructions they received and to charge a higher  
2 rate on most of those trades. As a result, State Street  
3 charged AXA \$1.3 million, close to three times the commission  
4 that it had promised.

5 Ladies and gentlemen, you will hear the defendant  
6 give those instructions in his own words. That's because at  
7 State Street, just like at many other banks, certain phone  
8 lines are recorded. And the defendant's line and  
9 Mr. Pennings' line were not recorded. But Boomgaardt's line  
10 and the trader's lines were recorded. That's a bank policy,  
11 designed to make sure that if there's ever a disagreement  
12 about a trade, there's a record of what was said.

13 As a result, you will hear the defendant actually  
14 instruct that bond trader to apply commissions to each and  
15 every one of those Royal Mail trades and then to zero them  
16 out when he sends the file over to his colleague. You will  
17 hear him instruct the traders on AXA to charge a different  
18 price than State Street promised and you will hear him  
19 instruct those traders in Boston to send over the high prices  
20 of the day to him in London, before booking out the trades to  
21 KIA. In fact, when you listen to that call, I'd ask you to  
22 pay close attention. You will actually be able to hear the  
23 defendant giggle when he asks for the high price.

24 How else are we going to prove this case to you?  
25 Through a variety of different kinds of evidence.

1           You will hear from Ed Pennings and Rick Boomgaardt,  
2     the defendant's two co-conspirators in Europe. They will  
3     take you behind the curtain in this conspiracy and tell you  
4     about how it came about and how it worked. They will walk  
5     you through those phone calls and give you realtime insight  
6     into what they were thinking when they carried out this  
7     scheme with the defendant. And as the three of them tried  
8     desperately to cover it up.

9           You will learn that Boomgaardt and Pennings have  
10    pled guilty to committing the crime of conspiracy and that  
11    they will testify before you in the hopes of obtaining  
12    leniency when they're sentenced. You will have the  
13    opportunity to evaluate their testimony for yourselves and  
14    you should evaluate it very closely. The Judge will instruct  
15    you to give it extra scrutiny. And you will evaluate whether  
16    and how it's backed up by the other evidence that you will  
17    see and that you will hear.

18          You'll also hear from some of the other people who  
19    worked for the defendant at State Street, including the  
20    traders who executed his instructions and applied those  
21    hidden commissions to those client traders. You'll see the  
22    e-mails and other documents the defendant and his  
23    co-conspirators sent and received. What they said to win  
24    those deals, the false promises that they made to clients,  
25    the misrepresentations and half truths that they told, and

1 also what they said to each other at the same time.

2 And you will hear from several of the victims of  
3 the defendant's fraud, the people to whom those false  
4 promises were made. They will testify about the trust that  
5 they placed in State Street to live up to those promises and  
6 about how State Street took advantage of and breached that  
7 trust.

8 Here's what else the evidence is going to show. In  
9 June of 2011, executives at one of those defrauded clients,  
10 Royal Mail, discovered that the price of each and every one  
11 of the bonds State Street had traded for them in the United  
12 States was off by exactly 1 basis point of yield. Now, that  
13 didn't seem right to them, because State Street had agreed to  
14 charge Royal Mail a flat fee and no commissions. Now, we'll  
15 explain to you later how they were able to figure it out for  
16 the bonds that traded in the United States, but why it was  
17 impossible for them to know what they had been charged in  
18 Europe.

19 An executive at Royal Mail, a man named Ian  
20 McKnight, sent an e-mail to Ed Pennings, asking him about it.

21 Pennings responded, that doesn't seem right. Let  
22 me investigate.

23 You will learn that the Royal Mail inquiry set off  
24 a three-month scramble by the defendant, Pennings, and  
25 Boomgaardt to cover up what they had done. First, the

1 defendant came up with a plan to claim that the commissions  
2 were a fat-finger error. You know what that is, when you go  
3 to your computer, and your finger actually hits the wrong  
4 button, bumps the wrong key. At the defendant's direction,  
5 Pennings sent this e-mail to McKnight.

6 Further, to our discussion yesterday, we have  
7 confirmed inadvertent commissions applied on your fixed  
8 income trading of \$954,406. Inadvertent commissions applied.  
9 That means that the commissions were applied by mistake.

10 Who came up with that language? The defendant did.  
11 He instructed Pennings to use that exact language, even  
12 though you will hear the call in which it was the defendant  
13 himself who personally ordered the trader to apply those  
14 commissions and then to hide them when he sent over the  
15 trading results to his colleague. And even as the defendant  
16 ordered that that close to a million dollars in overcharges  
17 on US trades be refunded to Royal Mail, he tried to keep  
18 Royal Mail from finding out that he had also charged  
19 \$2 million worth of hidden commissions in Europe. He even  
20 lied to State Street's compliance department. That's the  
21 bank's internal watchdog, to keep them from finding out. But  
22 eventually, that lie, too, unravelled.

23 You will learn that at the end of August 2011,  
24 Boomgaardt ignored the defendant's order to send a letter to  
25 Royal Mail and its consultant from the head of compliance at

1 State Street, claiming that \$1 million was the correct refund  
2 and that it had been discharged as a mistake. Instead,  
3 Boomgaardt reported to higher-ups that the commissions had  
4 been charged deliberately and that they had been charged in  
5 Europe, as well.

6 You will hear the defendant's realtime reaction  
7 when that happened, in a recorded phone call on August 26,  
8 2011, between the defendant, Boomgaardt, and Pennings. On  
9 that call, you will hear the defendant tell his  
10 co-conspirators that they're going to have to come clean,  
11 that they're going to have to rip the band-aid off, that they  
12 don't have a leg to stand on; that he fears the situation  
13 with Royal Mail is just the tip of the iceberg.

14 And then you will hear the three men talk about a  
15 plan to try to convince State Street that everything they did  
16 with Royal Mail was legitimate, that the contract with Royal  
17 Mail actually allowed them to charge those hidden  
18 commissions. You're going to hear the defendant actually  
19 reading that contract over the phone, as he tries to come up  
20 with a cover story for what they've done.

21 But ladies and gentlemen, the evidence will show  
22 that there is no contract in the world that allows you to lie  
23 to people to separate them from their money. There is no  
24 contract in the world that permits you to tell someone that  
25 you're charging them one price, while secretly intending to

1 charge them another. And the contracts between State Street  
2 and its clients are no different.

3 You're going to hear about those contracts over the  
4 course of this trial. None of them gave the defendant and  
5 his co-conspirators the right to deliberately mislead their  
6 clients about what the bank was charging and there's no law  
7 that allows you to do that, either. That's fraud.

8 For his actions, the defendant is charged with  
9 three crimes. Count 1 charges him with conspiracy to commit  
10 securities fraud and wire fraud. Now, you'll hear from Judge  
11 Sorokin that conspiracy is a legal word for an agreement or  
12 an understanding between two or more people to do something  
13 that the law forbids. The understanding in this case was  
14 between the defendant, Ed Pennings, and Rick Boomgaardt.

15 Counts 2 and 3 charge the defendant with securities  
16 fraud. That's a form of fraud that involves stocks and  
17 bonds, like the ones that State Street's clients hired it to  
18 buy and sell on their behalf.

19 Counts 4 through 6 charge the defendant with wire  
20 fraud. That's just fraud that involves a wire, like a phone  
21 call, or an e-mail.

22 In the end, the evidence will show that the  
23 defendant conspired with Boomgaardt and Pennings, promised  
24 clients one price, and secretly charged them another. That  
25 they applied hidden commissions to billions of dollars' worth

1 of trades, earning State Street millions of dollars in the  
2 process; that they knew that what they were doing was wrong  
3 and that when they got caught red-handed, they lied to cover  
4 it up.

5 After you've heard all the testimony, listened to  
6 the recordings, and sees all the other evidence, Mr. Johnston  
7 and I will have the opportunity to speak with you again. And  
8 when we do, we will ask you to deliver the only verdict  
9 consistent with that evidence, that the defendant is guilty  
10 as charged.

11 Thank you.

12 THE COURT: Thank you, Mr. Frank.

13 Ladies and gentlemen of the jury, I remind you that  
14 opening statements are not evidence, just an outline of what  
15 counsel believes the evidence to be.

16 In a moment, we're going to begin the opening  
17 statement of Mr. Weinberg, but to allow counsel to get  
18 organized and the like to switch from one to the other and  
19 their presentations and so forth, we're going to take a brief  
20 break.

21 So all rise for the jury.

22 (The jury exits the courtroom.)

23 THE COURT: All right. You can be seated.

24 How long do you think you need?

25 MR. FRANK: Probably just a second.

1 THE COURT: Okay.

2 Do you want the monitor there, Mr. Weinberg?

3 MR. WEINBERG: Yes, Your Honor.

4 MR. JOHNSTON: You do want this here?

5 THE COURT: He does.

6 MR. WEINBERG: We'll need about five minutes to get  
7 organized, Your Honor, to show Mr. Frank the exhibits.

8 THE COURT: Okay. We'll stand in recess for five  
9 minutes.

10 (Court in recess at 9:55 a.m.  
11 and reconvened at 9:58 a.m.)

12 THE COURT: We're back in session. I understand  
13 from Mr. Frank there are two that he has an issue with.

14 MR. FRANK: That's correct, Your Honor.

15 THE COURT: If you -- can you tell me what it is,  
16 or show me what they are?

17 MR. FRANK: Sure. Well, the defense can show you  
18 what they are. One of them is an e-mail that we've actually  
19 discussed previously in court. It's an e-mail from the  
20 defendant to two individuals at State Street, his boss, David  
21 Puth and Karen Keenan, in which he advises them of  
22 anticipated revenues for upcoming deals. So as to the  
23 defendant -- well, the whole e-mail is hearsay and it  
24 includes the response from one of those executives, "you made  
25 my day." And if I recall correctly, Your Honor said you



1 weren't sure how you could see why that response would be  
2 relevant. So it's both hearsay and relevance is the  
3 objection.

4 THE COURT: What's the other one?

5 MR. FRANK: The other one is an audio clip that the  
6 defense wishes to play of a conversation not involving the  
7 defendant, but between the two co-conspirators, Boomgaardt  
8 and Pennings, and it's an audio clip in which Mr. Pennings  
9 says something to Mr. Boomgaardt about making sure the NTMA  
10 contract doesn't say anything about spreads. It's not going  
11 to be inconsistent with any prior testimony. It's hearsay as  
12 to the defendant. It cannot relate to the state of mind of  
13 the defendant, because he's not even on the call. And so we  
14 object to that coming in, as well.

15 MR. WEINBERG: It's a tape recording the Government  
16 has marked to play with Mr. Boomgaardt. It's an excerpt from  
17 a tape currently scheduled to be heard either today or  
18 tomorrow through Boomgaardt's direct.

19 THE COURT: It's just a portion of the tape that  
20 the Government is not playing.

21 MR. WEINBERG: No, they are playing it. They just  
22 don't want me to use.

23 THE COURT: You're playing that tape?

24 MR. FRANK: I'm actually not --

25 THE COURT: You're offering that into evidence?

1 MR. FRANK: I'm not sure, Your Honor. I'll have to  
2 check.

3 MR. WEINBERG: It's in your transcript book.

4 MR. FRANK: If you're telling me that that's in our  
5 transcript book, then I will withdraw the objection on that  
6 one.

7 On the other one, I continue to object on hearsay  
8 and relevance grounds.

9 THE COURT: Do either of you have a copy of it,  
10 just so I can look at it?

11 MR. WEINBERG: Yes, Your Honor.

12 May I present it to Ms. Simeone?

13 THE COURT: Yes.

14 (The Court reviews the document and confers with  
15 the law clerk.)

16 THE COURT: So let me make sure we're talking about  
17 the same thing. This is the one where he outlines some large  
18 Q4 wins and large prospects, it's that change?

19 MR. FRANK: Yes, Your Honor. And she responds "you  
20 made my day."

21 THE COURT: Is that the part you don't like? It's  
22 not the rest of it at all?

23 MR. FRANK: All of it I object to, though "you made  
24 my day" is irrelevant and it's hearsay.

25 THE COURT: How doesn't that help you?

1 MR. FRANK: Your Honor, it's an evidentiary  
2 objection. It's not whether it helps or hurts me. It  
3 shouldn't come in.

4 THE COURT: I know. I'm just trying to understand.

5 MR. FRANK: Well, he's trying to make an argument  
6 that we think is an irrelevant argument, which is that he  
7 advised higher ups that these deals were revenue-generating  
8 deals. He can make the argument, but he can't put in this  
9 document, which is his own self-serving hearsay. It's not a  
10 business record. We're not objecting to the business records  
11 that he wants to put in that --

12 THE COURT: Why doesn't he show -- not as to "you  
13 made my day," but the rest of it, just to his state of mind  
14 as to what kind of profit they were going to make. That's a  
15 motive in the case.

16 MR. FRANK: That's not state of mind evidence, Your  
17 Honor. That's statement of belief and that's explicitly  
18 excluded under 803(3). He's not saying I'm happy, he's not  
19 saying I'm sad, he's not saying I'm exciting. He's saying I  
20 believe that we will earn \$5 million on this trade. First of  
21 all, so it's not under 803(3). It shouldn't come in for its  
22 truth, and it's just self-serving hearsay as to him and their  
23 response is equally hearsay.

24 MR. WEINBERG: Judge, the Government has charged  
25 Mr. McLellan with concealing business practices, implicitly

1 the expected revenue from State Street.

2 MR. FRANK: That's not true, Your Honor.

3 MR. WEINBERG: It's in the indictment, Steve.

4 MR. FRANK: It's not true that we've charged the  
5 defendant with concealing the revenue. It's concealing how  
6 he generated the revenue.

7 MR. WEINBERG: That's a distinction too thin to  
8 support an exclusion of a document that's offered not only  
9 under 803(3), but it's offered to reflect Mr. McLellan's  
10 state of mind at the time it was written, right before the  
11 KIA transition, rather than concealing the expected revenues  
12 from a zero commission transition.

13 He's telling Mr. Puth, his immediate supervisor,  
14 and Ms. Keenan, who worked with Mr. Puth, that this  
15 transition, this zero fee transition, is going to generate  
16 \$5 million dollars and --

17 MR. FRANK: Well, that's not, first of all, what  
18 he's saying in that e-mail, Your Honor. He's saying nothing  
19 about zero fee transition. But also, we are not objecting to  
20 other evidence that comes in within the rules of evidence  
21 that are proper business records about the fees that were  
22 generated. What we are objecting to is this hearsay,  
23 self-serving hearsay statement by the defendant.

24 MR. WEINBERG: Judge, (a), this is a business  
25 record. This is normal, ordinary ways that State Street

1 communicates up the hierarchy regarding their pipeline, their  
2 forecasted revenues. Secondly, it is state of mind, but  
3 third, it's not even offered right now for the truth, it's  
4 offered to demonstrate Mr. McLellan's good faith --

5 THE COURT: Why do you need "you made my day."  
6 Never mind why you need it.

7 MR. WEINBERG: It tells them right back that what  
8 you're doing is supported by Mr. Puth and myself, since  
9 Mr. Keenan works with Mr. Puth.

10 THE COURT: But what's supported, that he's getting  
11 money?

12 MR. WEINBERG: It's endorsement of the transition  
13 revenues, which are part of the transition, which has zero  
14 front fees. It shows, to State Street --

15 THE COURT: Is there going to be evidence that she  
16 knew that there was zero fees?

17 MR. WEINBERG: Not direct evidence, Your Honor, but  
18 she's a professional banker, as is Mr. Puth. They know  
19 what's going on under their regime.

20 MR. FRANK: There is zero evidence that she knew  
21 anything about it.

22 MR. WEINBERG: The Government disputes she knows  
23 it, but I'm entitled, Your Honor, to show Mr. McLellan's  
24 transparency with the hierarchy of the bank.

25 MR. FRANK: He's not entitled to argue facts that

1 are not in evidence, Your Honor, and that will not be a fact  
2 in evidence. There will be nothing even remotely suggesting  
3 that she knew anything.

4 MR. WEINBERG: This will be offered as part of a  
5 group of evidence to show transparency of a routine basis.

6 THE COURT: So this is what I'm going to do. I'm  
7 not ruling on whether the document is admissible in evidence  
8 or not. This is just your opening statement. Certainly, it  
9 seems reasonable to put in -- I'm not -- I'm overruling the  
10 objection of the Government as you using it in the opening,  
11 which is your statement of what you anticipate the evidence  
12 to be as to his e-mail to her.

13 I will tell you, as to the "you made my day," that  
14 seems potentially more problematic. I'm not ruling that it's  
15 in or out now. I'm not ruling in or out any of it. All of  
16 you are just making statements about what you think the  
17 evidence will be. That one -- that part seems potentially  
18 more problematic, because its significance depends upon a  
19 basis for its relevance and admissibility seems to depend  
20 upon a basis to infer that she knew.

21 So I'm not sustaining the objection even to that as  
22 to using in the opening, but I'm just highlighting for you  
23 that one. I'm not admitting the other part, I'm not ruling  
24 on your evidentiary objection. So I'll hear you. But that  
25 other part seems more problematic to me in forecasting what

1 the issues are.

2 MR. WEINBERG: I'll cover the subject without using  
3 the demonstrative, Your Honor.

4 THE COURT: All right.

5 MR. FRANK: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 Ready to go?

8 MR. WEINBERG: Ready to go.

9 THE COURT: All right. Go get the jury.

10 (The jury enters the courtroom.)

11 THE COURT: Mr. Weinberg, are you ready to go?

12 MR. WEINBERG: Thank you.

13 THE COURT: Go ahead.

14 **OPENING STATEMENT BY THE DEFENDANT**

15 MR. WEINBERG: Good morning, ladies and gentlemen.  
16 I'm Martin Weinberg, along with Rob Goldstein, Max Nemtsev.  
17 We have the honor of representing Ross McLellan.

18 There are few horrors greater in a democracy than  
19 for an innocent man to be accused of crimes he did not  
20 commit. The evidence will compel him -- over the next  
21 several weeks, show you that Ross McLellan is not only  
22 presumed innocent. He's factually and legally innocent,  
23 wrongfully charged for crimes that, if committed by anyone,  
24 were committed by the Government's two star witnesses, Edward  
25 Pennings and Richard Boomgaardt.

1           Each of whom, one a Dutch citizen, one a Canadian  
2 citizen, both living in London, or the London areas, tried  
3 desperately to escape the risks of imprisonment an ocean away  
4 from their families and chose to enter cooperation agreements  
5 with the Government, where they traded and bargained away  
6 their testimony and we contend the truth, in an effort to  
7 please the prosecutors and earn each of them what they  
8 expected to be a ticket for freedom out of this US  
9 prosecution.

10           The core allegation in this case is false  
11 statements. That the Government didn't tell you that Mr.  
12 McLellan, of the seven clients who were allegedly defrauded,  
13 of the seven of them, Mr. McLellan made no false statements  
14 to any of them. Didn't even speak with six of the seven.  
15 And the seventh, the US domestic insurance company, AXA, he  
16 was on a conference call that had nothing to do with pricing  
17 or charging or markups or spreads.

18           Mr. McLellan, to underscore the point, never spoke  
19 to, never met, never e-mailed, never texted, was not on a  
20 conference call with any of Mr. Pennings' six European  
21 clients; not Royal Mail, not KIA, not NTMA, not any of the  
22 others. Didn't even have an e-mail with Mr. McKnight of the  
23 Royal Mail, or with the NTMA people or with Mr. Das who  
24 represented the KIA. Mr. Pennings monopolized the  
25 communications between his clients and to State Street.



1           This is a prosecution of a man who trusted the  
2           wrong person in Edward Pennings, who relied on Mr. Pennings,  
3           who was the head of the UK office, with lots of people under  
4           his, Pennings' supervision. Who relied on Mr. Pennings to  
5           know the law in the UK, to talk to the UK lawyers. State  
6           Street is a global bank. They had lawyers in each of its  
7           divisions. He relied on Mr. Pennings to negotiate contracts  
8           that conformed to British and European law. He relied on  
9           Mr. Pennings to engage in negotiations that conformed to the  
10          contracts and conformed to the British and European laws.

11           Mr. McLellan relied in good faith on Mr. Pennings,  
12          and Mr. Pennings betrayed him, Mr. McLellan.

13           Mr. McLellan is being accused of being criminally  
14          responsible for what, at its essence, is Pennings' excesses,  
15          Mr. Pennings' lies, Mr. Pennings' deceptions of his,  
16          Mr. Pennings' clients.

17           Mr. McLellan did have a supervisory role over  
18          Mr. Pennings. Mr. McLellan was in Boston, Mr. Pennings in  
19          Europe. Mr. McLellan had a thousand transitions a year under  
20          his watch, ranging from transitions in Boston to transitions  
21          in Tokyo, South Africa to London, and businesses this big,  
22          global businesses, State Street business. Mr. McLellan had  
23          to delegate responsibilities and in this case he delegated  
24          them to the wrong person in Mr. Pennings.

25           Mr. Frank mentioned the seventh transition, AXA,

1 the domestic insurer, the only one that was not under  
2 Pennings' watch. It was not only not a crime in regards to  
3 AXA, it wasn't even a breach in contract. There was no  
4 contract between AXA and State Street. There was just a  
5 business arrangement, the give and take between a billionaire  
6 client and a billionaire bank. The evidence will show that  
7 concealment and secrecy is the hallmark of a conspiracy.

8 Mr. McLellan's relationship to this transition, the  
9 only United States transition that is at stake in this  
10 prosecution, was open, was proper, was consistent with  
11 business norms. The evidence will show from the Government's  
12 own witnesses, that the commissions charged to AXA were not  
13 only reasonable, but they were under industry norms. And the  
14 evidence will show, as a result, AXA was happy with the  
15 performance of this transition and rehired State Street just  
16 months later to do a separate transition.

17 The Government doesn't always get it right. Every  
18 one who were prosecuted are not guilty. 243 years ago, our  
19 founding fathers rebelled against the British monarchy, the  
20 British crown. They distrusted authority being centralized  
21 with a king and a sovereign. And they enacted, as a result  
22 of this distrust, a set of rights which formed the  
23 cornerstones, the foundation of the criminal justice system.  
24 The founding fathers architected a set of rights that include  
25 presumption of innocence, the cornerstone right. The right

1 that every defendant charged by federal prosecutors enjoys in  
2 an American courtroom.

3 They put this burden of proof squarely on the  
4 Government, on the accuser, on the representatives of the  
5 prosecution, and they created a high burden of proof, proof  
6 beyond a reasonable doubt. A standard of proof that's  
7 different than we use in our daily life. But most  
8 pivotably -- most pivotably, they entrusted the decision,  
9 ultimately, over guilt or innocence, over whether you believe  
10 or don't believe a witness, credibility judgments, the  
11 founding fathers entrusted it not to a judge, who's as wise  
12 as Judge Sorokin, not to a government, but to a jury of 12.

13 Mr. Goldstein and I, Mr. Nemtsev, over the course  
14 of the next three weeks, will demonstrate to you through  
15 evidence, not just through this exchange in opening  
16 statements, which the Court properly instructed were not  
17 evidence. We will present to you and prove to you that the  
18 prosecution is built on a flawed foundation. It's built on  
19 the quicksand of testimony of Mr. Pennings and  
20 Mr. Boomgaardt.

21 Testimony that derived from deals, exchanges of  
22 testimony with the Government, exchanges of testimony to the  
23 Government, with the hope and expectation that at the end of  
24 this trial, Mr. Frank, the Assistant US Attorney, will  
25 support Mr. Pennings' and Mr. Boomgaardt's need and request

1 to exchange their testimony for a benefit, for a  
2 recommendation of sentencing leniency for Pennings and  
3 Boomgaardt, who are the two State Street former executives  
4 who will loan, one to one, with the six clients that Mr.  
5 Frank told you, in the Government's position, who are  
6 allegedly victimized by the charges.

7 We'll show you that before these cynical,  
8 self-serving deals that were cut by Pennings and Boomgaardt,  
9 the investigation of Royal Mail, for instance, was focused on  
10 contracts, and whether the contracts supported both the fee  
11 and the trading revenues. The investigation was focused on  
12 business dealings between, as I said, giant billionaire  
13 clients, like the KIA, which had hundreds of billions of  
14 dollars in royal sowed money in the coffers of State Street,  
15 in the State Street bank. That focused on competition in  
16 Europe between State Street, and the Goldman Sachses and JP  
17 Morgans and Citibanks, the more famous, global banks.

18 But after the deals were cut with Pennings and  
19 Boomgaardt, deals cut because Pennings and Boomgaardt had an  
20 understandable fear of being locked away in a prison an ocean  
21 away from their families. Boomgaardt and Pennings both  
22 understood, both believed that in order to get the benefits  
23 of their dealings, they needed to blame Ross McLellan for  
24 their conduct, their communications, their e-mails, their  
25 trading charges.

1           For years, you will learn, that Mr. Pennings and  
2 Mr. Boomgaardt asserted their own innocence. They made  
3 written statements, each of them, proclaiming their  
4 innocence, proclaiming that the contracts supported the  
5 charges, supported the business charges between State Street  
6 and its clients.

7           Mr. Pennings, for six years, told everyone State  
8 Street -- in its internal investigation, State Street's  
9 outside lawyers from Freshfields, disciplinary hearing  
10 officers, an employment tribunal, where Mr. Pennings  
11 challenged his being discharged. The City of London Police,  
12 the investigating arm of Great Britain, the FCA, which is  
13 Britain's SEC. It regulates the securities industry.

14           Mr. Pennings told all of these people for six years  
15 that the contracts supported the charges, that State Street  
16 lawyers endorsed the contracts and endorsed the charges. And  
17 that he was innocent, a scapegoat, a victim of State Street's  
18 witch hunt against him. Those will be Pennings' words before  
19 he exchanged his testimony with the United States  
20 prosecutors.

21           Same with Mr. Boomgaardt, who will be the  
22 Government 's first witness. For two and a half years, he,  
23 too, proclaimed his innocence, until each of them bowed to  
24 the fear, the pressure, the debilitating anxiety of being  
25 targeted by a US criminal investigation oceans away from

1     their home; being targeted for their communications. And I  
2     mean Pennings' and Boomgaardt's communications, because Mr.  
3     McLellan never spoke to these clients; to clients from the  
4     Netherlands, clients from Kuwait, clients from Great Britain,  
5     clients from Ireland.

6             The evidence will be that Pennings and Boomgaardt  
7     each lacked the will to withstand this assault against their  
8     futures and they surrendered to the power of the prosecutor  
9     to get the benefit of the bargains, they changed their  
10    stories, Pennings changed his story 180 degrees,  
11    Mr. Boomgaardt less, because he was already trying to shift  
12    responsibility up to his hierarchy, when he was talking to  
13    his disciplinary officer, a disciplinary hearing officer.

14            They changed their stories and knew that they had  
15    to come to court here and blame Mr. McLellan, in order to get  
16    the benefits. Mr. McLellan, who unlike them, will not plead  
17    guilty to crimes he did not commit and is instead entrusting  
18    his future to you.

19            Let's look together at the agreements that  
20    Mr. Pennings and Mr. Boomgaardt executed and we'll try to --  
21    can we get them on the computer, as well?

22            MR. NEMTSEV: Yes.

23            MR. WEINBERG: Thank you, Your Honor.

24            This is Pennings' cooperation agreement and it's a  
25    full eight- or nine-page agreement. You'll receive it in

1 evidence. And it essentially defines Pennings' cooperation,  
2 what he expects, what the standards are in receiving what he  
3 expects. So the key language begins, Should the defendant,  
4 who is Mr. Pennings, provide substantial assistance in the  
5 investigation or a prosecution of another person.

6 And I submit that's in the prosecution of Mr.  
7 McLellan. The US Attorney and the fraud section agree that  
8 before sentencing, the US Attorney and fraud section will  
9 file a motion under sentencing law 5K.1, to recommend that  
10 the Court impose a sentence below the guidelines, below the  
11 advisory sentencing guidelines.

12 The key is the next paragraph. The determination  
13 whether Mr. Pennings has provided substantial assistance  
14 rests solely in the discretion of the US Attorney and fraud  
15 section and is not subject to appeal or review.

16 In other words, whether or not Mr. Pennings gets  
17 the benefit of this bargain, gets this 5K motion, gets a  
18 recommendation below the sentencing guidelines, increases his  
19 chances to avoid being incarcerated in the United States,  
20 depends solely on the determination made by the Government,  
21 by the prosecutor, who is not even subject to appeal or  
22 review.

23 Unreviewable sole discretion rests in the  
24 prosecutors, whether on one hand they help Mr. Pennings, and  
25 on the other hand, Mr. Pennings receives a Government

1 recommendation of 60 months in prison. There's no parole in  
2 our system. He'd do 85 percent, about four years in prison  
3 would be the Government's recommendation, away from his  
4 family who would be thousands of miles away. And that's what  
5 coerces witness's testimony and makes them want to please the  
6 prosecutor, and change what they told for six years,  
7 180 degrees for Mr. Pennings.

8 The US Attorney and fraud section, really Mr.  
9 Frank, Mr. Johnston, will make this determination when the  
10 defendant has provided substantial assistance, based upon the  
11 truthfulness and value of defendant's assistance in the  
12 prosecution of Mr. McLellan. And value. The standard is not  
13 just whether or not they deem Pennings' testimony to be  
14 truthful, it's whether or not they determine, in their sole,  
15 unreviewable discretion, that he has given value to one of  
16 two parties in this criminal trial with the Government.

17 It's a powerful incentive for a salesman like  
18 Pennings, who, for six years has asserted his innocence, for  
19 six years has said the contracts supported everything he did.  
20 For six years has been saying that the bank and its lawyers  
21 approved what he did, to do a 180-degree reversal and be  
22 blaming Mr. McLellan and claiming that what he did, did not  
23 conform to the contracts, did not conform to British law.

24 On the one hand, the five-year recommendation from  
25 his Government, the prosecutors. On the other hand, a



1 recommendation of sentencing leniency. The evidence will  
2 show that truth is the first casualty of this type of cynical  
3 agreement that rests on value to the prosecution, not just on  
4 truthfulness.

5           You will learn that Mr. Pennings -- Mr. Boomgaardt  
6 has sat with the Government, hour after hour, day after day,  
7 proffering, disclosing what they have to say. And yet the  
8 decision of whether to file this motion, to recommend  
9 sentence of leniency, or the decision to withhold it and not  
10 file it, has still not been made. The motions have not been  
11 filed.

12           The Government, despite spending day after day with  
13 Pennings and Boomgaardt, is withholding their decision, in  
14 their unreviewable sole discretion, whether to help Pennings  
15 or not, until after he testifies in this case. That's a  
16 heavy hammer over the head of a man that wants to avoid five  
17 years or four years in an American prison.

18           You will meet Mr. Pennings, he will testify. You  
19 will hear from Mr. Boomgaardt shortly, perhaps in a few  
20 hours. We will together navigate and explore their past  
21 statements and their current statements. It is your function  
22 to either believe or not believe them, to be detectives of  
23 deception, to judge their untrustworthiness or  
24 trustworthiness, when they point a finger of accusation at  
25 Ross McLellan in this courtroom.

1           You will hear that Mr. McLellan grew up in Rhode  
2   Island, went to college at Stonehill in Easton, got a job,  
3   went to night school. Boston College, business  
4   administration, and then at State Street. Through relentless  
5   and dedicated hard work, he earned every benefit. His  
6   promotions were not through entitlement or privilege, they  
7   were through hard work. He rose through the State Street  
8   banks to become its youngest executive vice president and he  
9   rose through the ranks of a bank, knowing that he had to  
10   follow its rules and practices, not to fire or ignore them,  
11   if he wanted to continue this path to success.

12           The evidence will show that Mr. McLellan was a man  
13   with absolutely no motive to authorize illegal conduct,  
14   fraudulent conduct, any conduct that breached the  
15   expectations of the bank. He fully believed that each of the  
16   transitions that are the subject of this federal criminal  
17   prosecution were consistent with contract and that each of  
18   the charges were authorized by those contracts.

19           State Street, as I said, had lawyers not only in  
20   Boston, but in England. Mr. McLellan fully believed that  
21   those lawyers in England had discussed the business  
22   arrangements, discussed the new business model, discussed the  
23   decisions in 2010 to compete with the Goldman-Sachs of the  
24   world. Those were decisions not made in the asylum, or at  
25   least Mr. McLellan did not believe them to be.

1           The evidence will be that Mr. Pennings told Mr.  
2       McLellan, also told Mr. Boomgaardt, the Government's first  
3       witness, that he, Pennings, had the approval of the State  
4       Street lawyers in London to establish this new business model  
5       of low explicit fees. For the KIA, there were zero fees.  
6       And instead, the bank would make its profits and revenues  
7       through trade. That was the business model of Goldman Sachs,  
8       the business model of the competitive banks with State  
9       Street.

10           And yes, they did conform or bring their business  
11       model closer in alignment to that of the other major global  
12       banks. They did it because the clients wanted it, these low  
13       fees. The clients preferred that the banks make their money  
14       through trading revenues. There's nothing illegal about  
15       conforming or bringing your business model into competition  
16       with the people that are also bidding for these transitions  
17       and there's nothing illegal about conforming your pricing  
18       strategies with the pricing that clients want.

19           Mr. McLellan had no motive to risk his career to  
20       support Pennings' business model, his negotiations, his  
21       communications with these clients. Mr. Pennings also told  
22       people --

23           This is May 2011. This is the business record of  
24       State Street. Mr. Pennings had just become the director of  
25       State Street Global Markets International. That's the

1 broker-dealer arm of State Street in Europe. He'd been made  
2 a director not by Mr. McLellan, but by Steve Smit, who was  
3 the head of the London office of State Street Global Market.  
4 He attended this executive meeting of State Street Global  
5 Markets, along with Mr. Smit, along with a variety of other  
6 people, including Simone Paul, who was the lawyer that  
7 Mr. Pennings told Mr. Boomgaardt, okayed and knew of the new  
8 business model and okayed and endorsed Mr. Pennings' using it  
9 in his negotiations with the European clients.

10 Mr. Bailey was like the CEO in Europe, Mr. Skully  
11 was the head compliance person. Here's what Mr. Pennings  
12 said at that meeting to all these people. Pennings queried  
13 the report whether he captured all the revenue in the  
14 transition management business, which included the revenue  
15 generated by the transitions that the Government is trying to  
16 criminalize in this case. He noted, meaning Pennings, that  
17 it only captures the fees. The small transition fees, the  
18 227,000 charged to Royal Mail, which is a lot of money to you  
19 and I, but not to a billionaire client to trade 2.4 billion  
20 worth of assets.

21 And then Pennings said that the report did not  
22 capture the spreads. That's bond language for markups,  
23 markdowns. It's fine language for the revenues that State  
24 Street made on the trading that the Government is trying to  
25 criminalize in this case.

1           So in May of 2011, Mr. Pennings is putting on  
2     record with everybody in Europe, including Mr. Smit, the  
3     lawyers, the compliance people, the COO, that spreads are  
4     being taken on European transitions, not just fees, but  
5     spreads, markups, markdowns, trading revenues that are going  
6     to State Street Global Markets, but do not appear on several  
7     of the reports.

8           Mr. Pennings also told people in the London office  
9     that he had had a conversation with four separate lawyers for  
10    State Street, two of them outside lawyers for the law firm  
11    named Herbert Smith, two of them State Street's in-house  
12    lawyers. And that he had told them, on this conference call,  
13    that their new contracts had to conform to the new business  
14    practice of State Street, which was to charge fees, to charge  
15    spreads, to have both of them, and not necessarily to be  
16    required to disclose them when the contracts between the  
17    clients and the bank approved them.

18          But the Government has no evidence as to why Mr.  
19    McLellan would deliberately risk his career, his future, his  
20    license as a securities person. There's no evidence here.  
21    The Government may argue, well, he was -- he wanted to make  
22    more revenues, but any compensation he would receive, only a  
23    tiny fraction of it was based on these European transitions.  
24    Mr. McLellan managed over a thousand transitions a year and  
25    he managed many other parts of the State Street business.

1           The Government may argue, well, transition -- the  
2 transition team wasn't doing well. But on December 22, 2010,  
3 Mr. McLellan sent an e-mail to about 50 or 75 people and he  
4 said, we're having a great year, revenues and transition  
5 management are up 8 percent.

6           He had no motive, his job was not at risk, his  
7 compensation was not at risk, he was on a positive trajectory  
8 with the bank. People don't commit crimes without motives  
9 and -- fraudulent crimes without a monetary motive. And  
10 there simply is no evidence that Mr. McLellan's job was in  
11 peril, salary in peril, compensation in peril, at the times  
12 with these principal transitions.

13           December 22, 2010, that's days before the NTMA  
14 transition was entered. It's two months before the Royal  
15 Mail bank -- Royal Mail transition was entered. He simply  
16 had no motive to knowingly, deliberately, or willfully enter  
17 a conspiracy to commit fraud with Mr. Pennings. And that's  
18 the standard in a criminal case.

19           This is not a civil case, where it is negligence,  
20 where jurors were asked whether somebody should have known.  
21 This is a criminal case, where the Government has the burden  
22 beyond a reasonable doubt to prove to you that Mr. McLellan  
23 acted knowingly, intentionally, and willfully. They need to  
24 prove that he didn't act in good faith and there's simply no  
25 evidence beyond a reasonable doubt why he would jeopardize

1 his life to support Pennings' business negotiations, absent a  
2 belief that Mr. Pennings, who was entrusted to run the  
3 British group --

4 We have an organization chart to prove just how  
5 many people were in it. There was simply no evidence beyond  
6 a reasonable doubt that Mr. McLellan simply trusted the wrong  
7 person.

8 The evidence will show that Mr. Pennings, who lived  
9 and worked in London, who was relied on to know British  
10 regulations, British law, to know the business models of  
11 State Street's competitors, to negotiate State Street's  
12 transition agreements with these European clients. It was  
13 Mr. Pennings who was relied on to know how to price the  
14 deals, how to conform his conduct to the State Street  
15 expectations, the rules, the laws. It was, in fact,  
16 Mr. Pennings who did negotiate the deals.

17 Mr. McLellan was his supervisor, and Mr. McLellan  
18 had a thousand transitions to supervise. He simply could not  
19 do them all.

20 The evidence will prove and you will be able to  
21 conclude from that evidence that he trusted too much. Maybe  
22 he didn't manage Pennings closely enough. The failures of  
23 management and failures of supervision are not willful,  
24 deliberate, knowing, intentional fraud. And that's the gap  
25 between what we believe the evidence will show and what the

1 Government has told you they contend to try to prove.

2           There will be evidence in this case about the  
3 contracts. Contracts defined the business relationships, not  
4 marketing materials, but contracts entered into between a  
5 billionaire client like Royal Mail, that had its own  
6 sophisticated representatives negotiating its interest in  
7 doing a transition, and State Street bank.

8           Let me show you the contract between Royal Mail and  
9 State Street. The contract came in 2005, and that brought it  
10 up and cemented it in this March transition. It was signed  
11 by Mr. Pennings and Mr. Smit, the head of the British office,  
12 on March 2, with the representatives of the Royal Mail. The  
13 key terms, and they're written in British legal language, so  
14 they're not easy, are these:

15           Conflicts of interest disclosure duties. The  
16 manager. That's the State Street Bank of Europe. The  
17 transition manager -- may benefit from the commission, fee,  
18 markup or markdown, payable by the customer -- that's Royal  
19 Mail -- to the broker-dealer. That's State Street's  
20 broker-dealer. The broker-dealer that generated a markup on  
21 the bond trades, the \$2.4 billion bond trades. So the  
22 contract says, point-blank, State Street can benefit from the  
23 markups of the broker-dealer.

24           An associate in the State Street Global Market  
25 acted as broker-dealer, meaning they're trading the bonds,



1 buying and selling, in respect to the portfolio transactions,  
2 that's the buying and selling of the bonds, may benefit from  
3 a commission, fee, markup or markdown payable to the  
4 customer.

5 So the contract legitimizes Royal Mail's paying a  
6 markup or markdown. A markup is simply if I sell a bond for  
7 100, the client will get 99.95 cents of 100, \$0.05 or \$0.04  
8 or less will go to the bank, or the broker, or whoever did --  
9 executed the trades.

10 Here is the key language in this contract. No duty  
11 to account for profits. Neither the manager, which is the  
12 transition manager, nor the associate, which is the  
13 broker-dealer, shall be liable to account for and/or pay the  
14 customer any profit, commission, or re-numeration received by  
15 moving of the bond trades referred to in clause 6-1, which --  
16 of the bond trades the are the subject of the transition.

17 So this is one of many contracts and will work  
18 together to navigate through the labyrinth of European  
19 transition grievance. It won't be easy. This is not a case  
20 like a bank robbery and the issue is who's the man with the  
21 gun. This is going to require us all to, together, explore  
22 and navigate through some of the business arrangements, the  
23 business deals, the business contracts between the bank and  
24 its billionaire clients.

25 But this contract says to Mr. McLellan that the

1 State Bank Europe negotiated an agreement with Royal Mail to  
2 charge markups to make money from markups from bonds, and  
3 that they have no obligation to tell the client the exact  
4 amount of the markups.

5 You know, banks are not, as we all know,  
6 not-for-profits. They're big businesses and when we go to a  
7 bank, deposit -- make a deposit, go to a bank if we're a  
8 small business and you deposit the week's profits, the bank  
9 receives it, gives us a deposit slip. They give you, if  
10 you're lucky, one percent or half a percent. It doesn't keep  
11 the money at the branch. It loans the money out, mortgage  
12 loans, car loans, at interest rates that far exceed the  
13 interest rate being paid for the deposit.

14 The bank has a right to do that under its rules and  
15 it's got a right not to tell him how much money they're  
16 making for your weekly deposit. What limits the bank --  
17 what -- banks have limits in this world of big business that  
18 we live with. We don't have to love it, but it's real.  
19 Banks are there to make money for its shareholders, the  
20 public, global banks.

21 What limits them is contracts. Parties like Royal  
22 Mail, sophisticated parties like KIA, they have leverage.  
23 They don't have to do business with State Street. They can  
24 do business with Goldman Sachs or JP Morgan. So they  
25 essentially entered into contracts. These clients can

1 negotiate contracts. They can say I don't like provision  
2 6.2. I want you to disclose your trading revenues. In this  
3 case, they didn't. They can walk away from State Street and  
4 say I don't like this contract, I want to know what profits  
5 you made. I want that written into a contract. They didn't.

6 And together we'll explore sort of the contracts  
7 that make up the foundation of this case.

8 Let me briefly turn to two of the transitions that  
9 the Government mentioned in its opening, KIA, Kuwait  
10 Investment Authority. The evidence will be indisputable that  
11 the representative of KIA told State Street either bid zero  
12 commission, zero fees, make your money through markups or  
13 trading, or you will not be selected to do this transition.

14 There were conversations. Mr. Pennings had these  
15 conversations, Mr. McLellan never met with them. Pennings  
16 went to the Mideast several times a year. Mr. McLellan never  
17 did. Had to rely on what Mr. Pennings was telling  
18 Mr. McLellan KIA was telling him. And what KIA was telling  
19 him, unless you change your business model, you're not going  
20 to succeed in getting this transition. So what did State  
21 Street do? They charged zero commission, zero fees. They  
22 would make their money through trading, they would make their  
23 money through markups.

24 And anyone in the investment world, the banking  
25 world knows, State Street was not going to move \$2 billion of

1 KIA assets from one group to another for free, for no  
2 commissions, no fees. It was understood that State Street  
3 was going to charge a markup. That's a charge in this case.  
4 It's part of their alleged conspiracy is they charge markups  
5 and didn't specifically disclose them, when KIA could only  
6 understand, and there was specific communications indicating  
7 they did understand, that State Street was not going to help  
8 them move billions and trade billions for free. There were  
9 going to be markups.

10 Mr. Frank said that Mr. McLellan was asking for the  
11 day's high and lows so he can conceal the markups from KIA,  
12 keep the markups so it was within what KIA can look at the  
13 financial pages -- could see are within the highs and lows of  
14 the day.

15 You will hear evidence that, in fact, certain of  
16 the bonds traded for KIA, that what the KIA price was was  
17 higher than the market high.

18 In other words, State Street was telling Mr. Das,  
19 look at the Bloomberg reports, the financial reports, you'll  
20 see these bonds traded between 90 and 100, but you're  
21 being -- you're getting 100 and one. You're paying 100 and  
22 one to buy the bond, really 100.18, not 100 and one. These  
23 markups were 1/100th of a percent. So when you hear four  
24 markups, that's 4/100th of one percent.

25 If Royal Mail was charged one percent of their

1     \$2.4 billion, they would have been charged \$24 million.

2     Instead, they paid 4/10th of one percent -- 4/100th of one  
3     percent, or about \$400 of a trillion million dollars' worth  
4     of bonds. \$4 to trade \$10,000 worth of bonds.

5             And we'll, again, explore the arithmetic of this  
6     labyrinthine world of finance. It won't be simple arithmetic  
7     to see what somebody did or did not do with regard to bonds.

8             Now, the Government argues well, Mr. Das and KIA  
9     were defrauded. KIA 115, that's the number of transitions of  
10    merger 15. They're getting charged for the bond trades,  
11    sometimes higher than the market high. That transition was  
12    shared amongst three banks. KIA was so happy with the  
13    results of that transition, that they were aiming to do a  
14    transition in November of 2010, twice as big a transition.  
15    They gave it all to State Street.

16            Performance is not just based on how high a  
17    commission is, whether it's two or three basis points. You  
18    will see evidence in this case focused on the seven clients  
19    of State Street that the Government alleges were victims.  
20    Five of them hired State Street to do later transitions,  
21    after the transitions that the Government is trying to  
22    criminalize.

23            A sixth one had consultants. The consultants sent  
24    State Street other transitions after the transition that is  
25    the subject of this prosecution. AXA, the domestic insurance

1 company, months after the transition that the Government  
2 claims is part of this case, they hired State Street to do  
3 another transition.

4           These are professionals. These clients of State  
5 Street, they're billionaire clients, they have consultants,  
6 they have lawyers, they have analysts, they have advisors.  
7 They repeatedly hired State Street, demonstrating that the  
8 performance of these transitions, the expertise of State  
9 Street, was successful. The clients got what they expected.  
10 There was a prediction to the clients made from what they  
11 call pre-trades. Mr. Boomgaardt will tell you about it in a  
12 bit, the predictions. What's the overall cost of taking a  
13 billion dollars of US Treasuries and turn them into a billion  
14 dollars of European bonds, and the fees are a minor part.

15           It's the overall costs that these clients are  
16 interested in. And these clients over and over again got  
17 what they paid for. Their expectations were met and the  
18 proof is they rehired State Street.

19           KIA 121, Mr. McLellan, the day after his twins were  
20 born, goes to the State Street office for an important  
21 meeting with certain of the heads of the State Street bank.  
22 E-mails are exchanged. And you will see that Mr. McLellan  
23 put on record, through e-mails -- it was a short meeting and  
24 then he went back to his family, but he put on record in the  
25 e-mails that there is going to be a markup by the

1 broker-dealer in this case. It's another zero commission KIA  
2 deal.

3 And this one, Pennings even told KIA, we'll cover  
4 all your custody costs and charge you nothing. Of course,  
5 KIA knew there was going to be trading revenues, that was no  
6 secret. You'll hear compelling evidence that KIA knew and  
7 agreed that State Street can mark up the bond trades and you  
8 will receive compelling, documented evidence, at the time of  
9 these discussions, that Mr. McLellan was sending him the  
10 contract and periodic notice to the global heads of  
11 compliance of legal, and making sure that the US authorities  
12 in Boston, State Street, understood Mr. Pennings' business  
13 model.

14 Royal Mail, Mr. Frank showed you an e-mail written  
15 by Mr. Pennings on February 21 at 9:20 from his home, to the  
16 Royal Mail representative, Ian McKnight. McKnight says to  
17 him, there's 227,000. Does that cover it all, does that  
18 include all trading revenues? Something the other clients  
19 didn't ask. Mr. Pennings says yes, but don't make me do it  
20 again.

21 This e-mail, unlike many other e-mails where Ross  
22 gets an FYI, after Mr. Pennings' cuts his deals, this e-mail  
23 was concealed by Mr. Pennings. There is no evidence that  
24 Mr. Pennings ever forwarded that e-mail that promised Royal  
25 Mail that the 227,000 would be their only charge. When

1 6 months later, Mr. McLellan found out that Mr. Pennings,  
2 from his home, made an off-the-contract secret promise to get  
3 a deal, Mr. McLellan -- Mr. Pennings, the salesman, telling  
4 Mr. McKnight, the representative of Royal Mail, don't worry,  
5 this will be it.

6 Mr. McLellan didn't know of and no one knew of that  
7 e-mail for 6 months. It hit Mr. McLellan like a missile in  
8 the night, that Mr. Pennings had betrayed him. That's  
9 Mr. Pennings, the salesman. That e-mail, it's an important  
10 e-mail. It's a promise by Mr. Pennings to a client. That  
11 e-mail was kept by Mr. Pennings, secret. It was concealed by  
12 Mr. Pennings. It was not disclosed by Mr. Pennings in  
13 conversations.

14 Royal Mail complains. They found out that there  
15 was a markup. Mr. McLellan steps in, sends them back a  
16 million dollars, rebates them part of their markup. This is  
17 business. You will hear evidence that State Street regularly  
18 made political concessions to clients. They made it, because  
19 they wanted the client's good weather. They wanted the  
20 client's business. And as much as a million dollars is a  
21 huge, huge amount to you and I, to a global bank that makes  
22 hundreds of billions of dollars, it's the price of doing  
23 business, and the price of keeping the client happy.

24 AXA. Again, the Government is taking what you will  
25 find to be ordinary business between two giant businesses and



1       trying to make it something more. The prosecutors are  
2       lawyers, not bankers, not businessmen.

3               If we can just play a minute of the audio. This is  
4       Mr. McLellan openly talking to the US treasurers.

5               (Audio plays.)

6               THE WITNESS: You'll hear the whole tape. This is  
7       the way that bankers talk to traders and supervise trades.  
8       What's important is, that if Mr. McLellan for one second  
9       thought that there was any wrongdoing, anything wrong,  
10      anything that State Street didn't approve, anything that  
11      would violate the regulations of any regulator, he didn't  
12      have to have a tape-recorded call with five people, an open  
13      call, where he's telling them about the complexity of the  
14      deal. Where you'll hear, when you hear the whole tape, that  
15      he set certain small markups, very small markups. Markups  
16      that you will conclude are beneath the industry norms.

17              Could have asked all the traders, go to my office,  
18      where there's no tape recording. He didn't. He called into  
19      a tape-recorded line. Been at State Street for 15 years. He  
20      knows the traders lines are taped.

21              Likewise, with other of the transitions where he's  
22      talking to a trader and telling them to add a markup, he  
23      could have easily walked down to the trader and told him  
24      that. He could have asked the trader to walk up to his  
25      office. They're all in the same building.

1           This is the acts of someone who acts in good faith,  
2           who thinks that his instructions are consistent with  
3           contracts, who believes that he is asking, as you heard on  
4           the tape, charge a fair markup between AXA, the insurance  
5           company. It was working with another branch of State Street  
6           as its advisors, State Street Global Advisors and State  
7           Street Global Markets.

8           NTMA, very quickly.

9           THE COURT: Mr. Weinberg.

10          MR. WEINBERG: Nine straight proposals that State  
11          Street had made and nine straight times they lost. Pennings  
12          asks them, why are we losing. They tell Mr. Pennings, your  
13          fees are too high. What does Mr. Pennings do? He lowers the  
14          fees and correspondingly increases the trading revenues. But  
15          first, they see whether or not the contract permits the  
16          charging of trading revenues. This is a small slice of a  
17          conversation between Pennings and --

18          (Audio plays.)

19          MR. WEINBERG: Mr. Pennings is saying, make sure  
20          the contract doesn't prohibit the taking of spreads, because  
21          we're going to have to in the US. Again, this is realtime,  
22          this is December of 2010, this is the time of the NTMA  
23          transition. This is not the time -- this is really 7 years  
24          before Pennings cuts his deal with the Government and changes  
25          his testimony.

1           This is the time when bankers were looking at  
2       contracts and seeing whether or not the spreads were allowed,  
3       whether or not the decision not to disclose the exact amount  
4       of compensation made by the bank was disclosed. You'll hear  
5       evidence that's industry norms. Banks don't ordinarily tell  
6       clients exactly how much trading revenues they made.

7           Ross McLellan was never part of a coverup, he was  
8       never part of any lies to compliance. The evidence will be  
9       that Ross McLellan, with a thousand transitions and a  
10      thousand other obligations, didn't have Royal Mail as the  
11      center of his life. But on August 26th, he did. And you'll  
12      hear tapes of his trying to catch up.

13          He asked on that date, Mr. Boomgaardt, send me the  
14      contracts, send me the requests for proposal. I need to take  
15      control of something that was off my radar until this day.  
16      And you will hear evidence that Ross asks Pennings, is this  
17      allowed by -- you're confirming, is this okay and legal and  
18      Pennings says yes. A fee and a spread are okay legally.

19          He asks Pennings, how many times did you charge  
20      your fee in a spread? Four times. This is a manager putting  
21      something squarely at the heart of the radar and the evidence  
22      will be that Ross McLellan, when he took over, went to the  
23      head of legal, went to the head of compliance, said there  
24      were intentional charges. I understand they would be  
25      consistent with contract. Let's discuss what to do. This is

1 not the act of somebody that had anything to hide, who was  
2 engaged in some concealment conspiracy.

3 The evidence will compellingly show that Mr.  
4 McLellan did not knowingly violate the securities law, that  
5 he did not knowingly violate the wire fraud law. That it's  
6 not a criminal mistake to trust the wrong person. The  
7 evidence will show that he is not responsible for these  
8 European transitions, and to the extent that clients were  
9 promised anything by Mr. Pennings that went outside the  
10 contracts, which ordinarily govern the relationships between  
11 the bank and its clients, that Mr. Pennings alone made  
12 promises, a master salesman. A man who may just believe the  
13 end of a sale justifies saying things that Mr. McLellan did  
14 not know he said, did not authorize him to say.

15 Mr. McLellan never authorized him to go one inch  
16 outside the contracts, to do anything that Mr. McLellan did  
17 not fully believe was known to, agreed to, endorsed by the  
18 lawyers at State Street.

19 Mr. McLellan has pled not guilty. We believe the  
20 evidence will demonstrate that he is not guilty. And I will  
21 have the honor at the end to ask you, not out of sympathy,  
22 but because of the evidence, to return a verdict of not  
23 guilty.

24 Thank you very much.

25 THE COURT: Thank you, Mr. Weinberg.

1 I remind you, ladies and gentlemen of the jury, the  
2 opening statements are not evidence, but an outline of what  
3 the lawyers expect the evidence to show. I told you before  
4 we are going to take a morning break around 11 o'clock, so  
5 we'll take the morning break now, and then we'll resume with  
6 the first witness.

7 All rise for the jury.

8 (The jury exits the courtroom.)

9 THE COURT: Okay. Stand in recess, come back at 20  
10 after, and then once we all assemble, we'll get the jury.

11 MR. WEINBERG: Thank you.

12 (Court in recess at 11:06 a.m.

13 and reconvened at 11:21 a.m.)

14 THE CLERK: The McLellan matter is back in session.

15 THE COURT: Please be seated.

16 (Discussion off the record.)

17 THE COURT: Counsel, can I see you at sidebar for  
18 one minute?

19 (At sidebar on the record.)

20 THE COURT: So Ms. Simeone talked to number 49's  
21 boss; she talked to HR. HR did not agree to change the  
22 policy. They said he's 50 percent of their -- this category  
23 workforce, and at the moment they're out a day diesel  
24 mechanic. So the question is either do I -- I could -- I  
25 could to some degree demand more, I could have a hearing,

1 but -- or -- so I invite your suggestions first as to how to  
2 proceed.

3 MR. JOHNSTON: And you have you had experience  
4 prevailing on employers before?

5 THE COURT: I have to be honest, with trying to  
6 prevail employers, my greatest experience was a lengthy death  
7 penalty trial that I tried two years ago. And in my  
8 experience in that was large employers, certain large  
9 employers, like National Grid. That's why I asked that  
10 question. National Grid, big employers like that will often  
11 pay for jury service. Smaller companies were typically three  
12 days because there's a state law in Massachusetts that they  
13 have to pay three days but wouldn't pay more than that. In  
14 that case, I just -- everyone agreed, but you couldn't have  
15 someone serve three months.

16 MR. FRANK: Do we know what size employer this is?

17 THE COURT: I don't -- Maria?

18 MR. FRANK: They obviously have an HR department.

19 MR. WEINBERG: Judge, to the extent your Honor  
20 exercises discretion to strike him, we have no objection.

21 THE COURT: What's the name of the company?

22 THE CLERK: The name of the company is Miller Truck  
23 Leasing, and I spoke with Brian Elliott, who referred me to  
24 Terry Paulis --

25 THE COURT: So my experience is there are companies

1 like Mass. General, big employers that do have this policy.  
2 I'm not aware of any legal requirement that requires them to  
3 pay -- my understanding is they can't punish a person, take  
4 away a job. The issue is the person's paycheck.

5 So that's my limited experience with that. And --  
6 and a sense of fairness in terms of thinking about like is it  
7 fair -- I guess the concern I have about having a hearing,  
8 making them come in for a hearing, is it seems heavy-handed,  
9 and it seems that it's not really fair because they're under  
10 no legal obligation to do it.

11 MR. FRANK: So I agree with that, your Honor, but I  
12 also, without knowing how big a company it is and whether  
13 it's just an HR person saying this is our policy and we're  
14 not going to change it, I'm not sure it wouldn't be worth a  
15 phone call. I suffer from the post-traumatic sense of having  
16 lost -- went through the alternates, including losing one on  
17 the first day, and then and losing him.

18 As Mr. Weinberg can tell you, I'm not against  
19 leaning heavily on people.

20 MR. GOLDSTEIN: I can attest to that.

21 (Discussion off the record.)

22 THE COURT: Can the people in the gallery, if you  
23 want to have conversations, if you can go outside, because it  
24 makes it difficult for the court reporter.

25 (At sidebar on the record.)

1 THE COURT: So you'd like us to find out how big  
2 the employer is?

3 MR. FRANK: I just think it would be worth that  
4 inquiry and make a call from you with a light touch as  
5 opposed -- I'm not suggesting a hearing.

6 THE COURT: So why don't you -- I'll call after  
7 1:00; I'll just call the person and see.

8 And I think at 1:00, I'll update the juror and ask  
9 him to come at least tomorrow. I'm not sure -- depending on  
10 whether I'll connect with the person whoever it was by  
11 tomorrow, because that would be his third day.

12 MR. FRANK: Thank you, your Honor.

13 MR. WEINBERG: Thank you, Judge.

14 (Discussion off the record.)

15 THE COURT: Counsel, Ms. Simeone was saying HR is  
16 in New Jersey.

17 THE CLERK: And their owner is located in Illinois.

18 THE COURT: So maybe it's a reasonably big company.

19 (End of discussion at sidebar.)

20 (Jury entered the courtroom.)

21 THE COURT: Please be seated.

22 All right. Counsel, call your first witness.

23 MR. JOHNSTON: The government calls Rick Boomgaardt  
24 to the stand.

25 THE COURT: The witnesses are sequestered?



1 MR. JOHNSTON: Yes.

2 THE COURT: So, ladies and gentlemen of the jury,  
3 the witnesses will come in from the hallway. It takes a  
4 moment. And the reason for that is the witnesses don't sit  
5 in the courtroom to listen to the testimony of other  
6 witnesses. They just give their own testimony.

7 So, Mr. Boomgaardt, you can go right there to the  
8 witness box and remain standing, and Ms. Simeone will  
9 administer the oath to you.

10 (The witness was duly sworn.)

11 THE COURT: Go ahead.

12 You can be seated.

13 THE WITNESS: Thank you.

14 **RICHARD BOOMGARDT**

15 having been duly sworn, testified as follows:

16 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

17 BY MR. JOHNSTON:

18 **Q.** Mr. Boomgaardt, how old are you?

19 **A.** I'm 45.

20 **Q.** Where do you live?

21 **A.** I live just outside London in the UK.

22 **Q.** Where did you grow up?

23 **A.** I grew up in Canada.

24 **Q.** Did you used to work at State Street Bank?

25 **A.** Yes, I did.

1 Q. From what time period?

2 A. From 2008 to 2012.

3 Q. Where did you work for them?

4 A. In the London office.

5 Q. What was your job there?

6 A. I was the head of the transition management desk for  
7 Europe, Middle East, and Africa.

8 Q. What did you do in your job as transition manager?

9 A. I managed a team of project managers, portfolio managers  
10 that ran transition projects.

11 Q. Who did you report to in 2010, 2011?

12 A. I reported to Edward Pennings.

13 Q. What was his title?

14 A. He was a senior managing director and head of Portfolio  
15 Solutions for Europe, Middle East, and Africa.

16 Q. Who did he report to?

17 A. He reported to Ross McLellan.

18 Q. What was Mr. McLellan's title?

19 A. He was the global head of Portfolio Solutions.

20 Q. Did you commit a crime while working at State Street  
21 Bank?

22 A. Yes, I did.

23 Q. What did you do?

24 A. We took hidden commissions from clients, so money that  
25 clients weren't expecting to have taken from them.

1     **Q.** Do you see anyone in this room that committed that crime  
2     with you?

3             MR. WEINBERG: I object.

4             THE COURT: What's the objection?

5             MR. WEINBERG: To a legal conclusion of what is or  
6     what is not a crime, your Honor. We certainly have no  
7     objection to his identification of Mr. McLellan.

8             THE COURT: I'm going to overrule the objection but  
9     explain it to the jury.

10            So, ladies and gentlemen, the conclusion as to  
11     whether Mr. McLellan committed a crime, that's for you to  
12     determine. That's what this entire case is about. The  
13     government bears the burden of proof about that.

14            So with that context and with that qualification,  
15     you can have that question.

16     BY MR. JOHNSTON:

17     **Q.** Mr. Boomgaardt, do you see anyone in this room with whom  
18     you committed that crime?

19     **A.** Yes.

20     **Q.** Who is that?

21     **A.** Ross McLellan.

22     **Q.** Did you plead guilty to a crime in connection with his  
23     conduct?

24     **A.** I did.

25     **Q.** When did you plead guilty?

1     **A.**   Roughly a year ago.

2     **Q.**   What crime did you plead guilty to?

3     **A.**   Conspiracy to defraud.

4     **Q.**   When was your conduct first uncovered by the bank's  
5       clients?

6     **A.**   In mid-2011.

7     **Q.**   What happened to your job after the conduct was  
8       uncovered?

9     **A.**   Well, eventually I lost my job.

10    **Q.**   Have you worked in finance since?

11    **A.**   No, I haven't.

12    **Q.**   What have you been doing for work?

13    **A.**   I haven't had much paying work. Most of the stuff I've  
14       been doing has been voluntary.

15    **Q.**   I'm going to now ask you some questions about your  
16       career.

17               Where did you attend school?

18    **A.**   My first degree was at Queen's University in Canada.

19    **Q.**   What did you study?

20    **A.**   Mathematics.

21    **Q.**   Did you have any additional education?

22    **A.**   Yes, I did a master's degree at Reading University in the  
23       UK.

24    **Q.**   What did you study there?

25    **A.**   International securities investment and banking, so

1 finance essentially.

2 **Q.** Was your first job after graduate school?

3 **A.** I worked at Goldman Sachs.

4 **Q.** What did do you at Goldman Sachs?

5 **A.** I was part of their graduate recruitment class, but I  
6 worked in a group called pension services for most time I was  
7 there.

8 **Q.** What did you do in your role at pension services?

9 **A.** We were a coverage group for pension funds, so we would  
10 really talk to them about what their investment needs were  
11 and how that might fit in with the products that Goldman  
12 Sachs offered.

13 **Q.** Where did you work for Goldman Sachs?

14 **A.** In London.

15 **Q.** When did you leave Goldman Sachs?

16 **A.** I left Goldman Sachs in 2000.

17 **Q.** Where did you go after that?

18 **A.** I went to work for Credit Suisse after that, also in  
19 London.

20 **Q.** What is Credit Suisse?

21 **A.** It's the investment banking arm of Credit Suisse, so a  
22 big Swiss bank.

23 **Q.** That was also in London?

24 **A.** That was also in London.

25 **Q.** What did you do for Credit Suisse?

1     **A.** I started up their transition management business at  
2     Credit Suisse.

3     **Q.** How long did you work there?

4     **A.** I was at Credit Suisse for about eight years.

5     **Q.** And then where did you go after Credit Suisse?

6     **A.** After Credit Suisse, I went to work for State Street.

7     **Q.** I want to ask you a few questions about financial  
8     concepts. You stated you worked as a transition manager.  
9     Can you explain what one does?

10    **A.** Surely. Transition management is really a specialist  
11    portfolio restructuring and project management business.

12    **Q.** And who are your clients in this business?

13    **A.** Typically pension funds, insurance companies, government  
14    wealth funds, but I would say pension funds probably made up  
15    the majority of our clients.

16    **Q.** Can you tell us what a pension fund is?

17    **A.** Sure. A pension fund is a fund that is set up by a  
18    corporation, government for its employees to pay them their  
19    pension upon retirement. So it's a fund that's set up to  
20    fund the future pensions of their employees.

21    **Q.** What do pension funds invest in?

22    **A.** Lots of things. Stocks and bonds predominantly.

23    **Q.** Who typically manages the investments of a pension fund?

24    **A.** Pension funds normally hire asset managers to look after  
25    those pension funds. So the likes of Fidelity, Putnam, and

1 State Street Global Advisors. There's lots of asset managers  
2 that provide services to pension funds in that way.

3 **Q.** So if pension funds have asset managers, when would they  
4 need a transition manager?

5 **A.** Most often we got involved when they decided to change  
6 those asset managers, so if they were looking to hire a  
7 different portfolio manager, a different asset manager from  
8 the one they have now. And really, it's the transition  
9 manager's job to take the portfolio from what it looks like  
10 to what that new asset manager would like it to be. And  
11 quite simply, that involves selling the things that the new  
12 asset manager doesn't want to hold and buying the things that  
13 they do want to hold that weren't currently in the portfolio.

14 **Q.** What are the things that you buy and sell?

15 **A.** Predominantly stocks and bonds.

16 **Q.** How are transition managers compensated?

17 **A.** Generally speaking, we were compensated on a commission  
18 basis, so on a per-transaction commission for what we were  
19 trading.

20 **Q.** So each purchase or sale of the stock and bond, you'd  
21 earn a commission?

22 **A.** That was the typical charging structure we used, yeah.

23 **Q.** How was the performance of a transition manager  
24 evaluated, whether they've done a good or bad job?

25 **A.** It is evaluated across, I guess, a couple of different

1 ways. One is kind of how operationally smooth everything  
2 went. But from a numbers perspective, it's a concept called  
3 "implementation shortfall," which really captures all of the  
4 costs of moving that portfolio from one place to another.

5 **Q.** You used this term "implementation shortfall." Is that  
6 the -- when you say the total costs of a transition?

7 **A.** Yes. It captures all the costs of the transition.  
8 That's what it's designed to do.

9 **Q.** What is sort of a common way of understanding what that  
10 concept means?

11 **A.** Well, the concept really is a -- it assumes that in a  
12 perfect world you could just snap your fingers and you would  
13 be out of the portfolio that you didn't want to be in anymore  
14 and into the portfolio that you'd like to be in. And we then  
15 track what happens with the actual portfolio relative to that  
16 benchmark of having been able to snap your fingers.

17 Obviously in the real world you can't just snap  
18 your fingers. You have to actually do some trading to get  
19 from one place to another, and that can take some time. So  
20 that really captures all of the costs that the fund has  
21 incurred by making those changes.

22 **Q.** So the gap where the fund ends up and this theoretical  
23 benchmark is the implementation shortfall?

24 **A.** That's right. That's the simplest way to think about it.

25 **Q.** What are the largest components of this implementation



1     shortfall?

2     **A.**   You can divide it up in a few ways.  There's a direct  
3     cost component, if you like, the things that are easy to  
4     quantify.  And in that, you have things like exchange, taxes  
5     and fees, and also the commissions that we would charge.

6     **Q.**   So you call those direct costs?

7     **A.**   Yeah, direct, explicit.  They're easy to quantify.

8     **Q.**   And what are the indirect costs of a transition?

9     **A.**   So the indirect costs, again, there are a few.  One is if  
10    you look at a stock market quotation, for instance, you'll  
11    see two prices for a stock: one, a price where you can buy;  
12    and one, a price where you can sell.

13                 And the difference between those two things is  
14    called the "bid-ask spread."  So in theory, the fair price of  
15    that asset is right in the middle.  But because you're buying  
16    or selling it, you're dealing it at one price or the other.  
17    So there's a little bit of slippage in there.

18                 The second one is --

19    **Q.**   If I may pause you for a second.

20                 When you use the word "slippage," what do you mean?

21    **A.**   A cost.

22    **Q.**   So there's a cost to just trading in the market?

23    **A.**   Absolutely, yeah.

24    **Q.**   And what's the second category you were going into?

25    **A.**   The second one is simply by being in the market and

1 trading, you are either -- you are affecting the supply and  
2 demand of the things that you're buying.

3 If you're in the market buying something, you're  
4 putting demand into the market; if you're selling something,  
5 you are putting supply into the market. And the simple laws  
6 of supply and demand mean that that tends to move the price.

7 In the business, we call that "market impacting."  
8 So you're impacting the market you're trading in simply by  
9 putting your own trades in because you are affecting that  
10 supply and demand balance.

11 **Q.** And why, in particular, is that an issue with pension  
12 funds who are transitioning?

13 **A.** Well, it's -- I guess it's an issue for all of the funds,  
14 anybody that's doing it. It's a real cost, and it is because  
15 of the size of the transitions that we're doing. We can be  
16 talking about putting a lot of supply or demand when we're  
17 talking of trades that are hundreds of millions and billions  
18 of dollars in size. Those really can have an impact on the  
19 market if they're not managed correctly.

20 **Q.** So what you're saying is if you're selling a billion  
21 dollars of a certain stock, obviously the price would fall  
22 for that stock?

23 **A.** Yes, all other things being equal. You're putting quite  
24 a lot of supply into the market there, yeah.

25 **Q.** Which parts of this implementation shortfall are merely

1 estimates before the transition actually occurs?

2 **A.** Sure. I guess the last part, I should finish off the  
3 implementation shortfall piece.

4 The last bit is when you're trading, it takes some  
5 time to finish trading a portfolio of that size. You can't  
6 do all of the trades at exactly the same time. You know,  
7 markets aren't open at the same time, the Far Eastern markets  
8 aren't open at the same time as the U.S. market is, for  
9 instance.

10 But while all the trading is going on, there is  
11 other news that's coming into the market. Companies are  
12 releasing earnings, there are terrorist events, there are  
13 earthquakes that are going on, and all of those things also  
14 affect the prices in the market.

15 Now, you can't do much about that, but it still is  
16 a cost to the fund and a risk to the fund of not being in the  
17 portfolio that you'd like to be in. And really, that part we  
18 call the "opportunity cost." And that can be -- that could  
19 go in the favor of the fund or it could be a cost, but  
20 it's -- it is another potential area of cost for the fund.

21 **Q.** So which of these categories are merely estimates before  
22 buying and selling begins?

23 **A.** The bid-ask spread is an estimate, although we can get a  
24 pretty good estimate on that because we've got quite good  
25 data for where those trade.

1           The market impact is also an estimate. That's a  
2     quantitative model that we use to come up with what the  
3     market impact costs, what we estimate the market impact cost  
4     based on things like how much of an average day's trading are  
5     we needing to trade for this.

6           And then the opportunity cost is also an estimate.  
7     And we assume that the markets aren't going to go for or  
8     against the client, but we then give them a range and say  
9     kind of two-thirds of the time you would expect your  
10    opportunity costs to be between sort of this side on the good  
11    and this side on the bad.

12    **Q.** So fair to say there's a lot of uncertainty in the  
13    transition business?

14    **A.** Yeah, yeah.

15    **Q.** Which part of the implementation shortfall can be known  
16    to a fairly good degree in advance?

17    **A.** The commissions, the direct bid. The commissions and  
18    taxes and fees can be known fairly directly.

19    **Q.** And why can they be known?

20    **A.** Because we've got a very good idea of how much we're  
21    going to need to trade. And we know what the commission  
22    rates are, we know what the taxes and fees rates are in the  
23    various different markets, so we can come up with a pretty  
24    accurate estimate of what that's going to be.

25    **Q.** Are they agreed upon in advance?

1     **A.** Yeah. The taxes and fees, there's nothing we can do;  
2     that's not negotiated, but that's set by the exchanges and  
3     countries themselves. Yes, generally the commissions are set  
4     and agreed and set out in the legal agreement that's in place  
5     between the transition manager and the client.

6     **Q.** So taxes, fees, and commissions are really the only parts  
7     of this cost that can be known in advance prior to beginning  
8     selling?

9     **A.** Yeah, the rest are estimates.

10    **Q.** I want to direct your attention to the beginning of 2010.  
11    Could you give us a sense of what the competitive environment  
12    was like for the London transition business that you were a  
13    part of?

14    **A.** Yeah, sure. I mean, it's -- I guess -- in order to  
15    answer that, I need to probably step back a little bit and  
16    talk a bit about coming out of the credit crunch and how 2009  
17    was.

18                 We had seen a few things in the transition  
19    management market at the back of the credit crunch. Part of  
20    that was we saw some of the investment banks pull away a  
21    little bit from the transition management business --

22    **Q.** Who were the investment banks that you're referring to?

23    **A.** We had seen -- well, for instance, where I used to work  
24    at Credit Suisse had shrunk the size of their transition  
25    management offering. So that was a good example of banks

1 sort of retrenching a little bit.

2 We also saw through 2008 and maybe a little bit of  
3 early 2009 that clients weren't really so keen to do a big  
4 restructuring because the markets they felt were a bit  
5 dislocated, that they weren't trading the way they normally  
6 do, and they were afraid that making a big shift in those  
7 markets was probably going to be more expensive than if they  
8 waited for a while.

9 So we had at that period a series of kind of  
10 pent-up demand, if you like, people who wanted to do  
11 transitions but hadn't done them yet. And a little bit less  
12 competition than we used to have, which meant that State  
13 Street in 2009 in Europe was in a good place to have a very  
14 good year, which we did. We had, I think, our best revenue  
15 year that we had had in 2009.

16 So going into 2010, we saw some of those  
17 competitors coming back into the market, being a little bit  
18 more aggressive on their commission quotes. And also, of  
19 course, that pent-up demand of transitions wasn't there  
20 anymore. It was getting back to sort of more normal market  
21 conditions for us in our business.

22 **Q.** And what effect, if any, did this have on your  
23 competition?

24 **A.** Well, there was more competition around. So it was -- it  
25 certainly felt like we were starting to lose business that we

1 had won in 2009 because other competitors were being more  
2 aggressive, particularly with their commission quotes.

3 **Q.** Who were your main competitors in this time period, early  
4 2010?

5 **A.** Transition management is a bit of a funny business in  
6 that way. We compete with some of the custody banks, like  
7 Northern Trust and Bank of New York.

8 We also compete with some of the asset managers in  
9 the UK. That was kind of Legal & General and BlackRock. And  
10 also some of the investment banks, so Citibank, Nomura,  
11 Goldman Sachs, Morgan Stanley.

12 **Q.** Was there any difference between State Street's business  
13 model at this time and the investment bank's business model?

14 **A.** State Street structurally is a bit different than the  
15 investment banks. So yes.

16 Our transition management business was set up in  
17 kind of the broker-dealer part of State Street, but different  
18 than an investment bank's broker-dealer in that we didn't  
19 really have any principal business. We weren't a  
20 market-making business where we were actively quoting prices  
21 in equities and bonds. We had what we call an agency model,  
22 where we're acting on the client's behalf to go out and  
23 trade.

24 **Q.** How does an agent compare to a principal in this type of  
25 market?

1 MR. WEINBERG: If your Honor please, we object,  
2 702. It's not been marked under 702. I think this is beyond  
3 701.

4 MR. JOHNSTON: He's testifying from his personal  
5 experience in decades in the industry.

6 THE COURT: So you cite 702?

7 MR. JOHNSTON: He's testifying based on his  
8 understanding of what these terms mean in the industry that  
9 he worked in for over 15 years.

10 (Discussion off the record.)

11 THE COURT: So he can explain what it meant to him  
12 and how he used those terms.

13 What we're discussing, ladies and gentlemen, is  
14 whether he's an expert and can offer expert testimony. Here,  
15 he can explain to you what "agent" meant to him and his work  
16 at State Street during the relevant time and how he used the  
17 term and how he understood it.

18 Go ahead.

19 BY MR. JOHNSTON:

20 **Q.** Can you explain to us what you understood the term  
21 "agent" to mean compared to the term "principal"?

22 **A.** Sure. I guess -- the way I like to think of it, I guess,  
23 is a principal is sort of like somebody who owns a used car  
24 lot. If you're looking to buy a car, you can go directly to  
25 a used car lot and they will sell you a car or buy your car



1 from you.

2 Alternatively, you can employ an agent whose job it  
3 is to go to all of the various used car lots and find the  
4 best price for you for either the car you want to buy or the  
5 car that you are selling.

6 An agent will charge you a fee, like the commission  
7 that we would charge in transition management for going  
8 around and doing that work for you in finding the best price  
9 for whatever it was that you wanted to buy or sell. That's  
10 probably the -- I guess the easiest analogy in my view.

11 **Q.** And in your understanding, how did the way an agent make  
12 money differ from the way a principal make money?

13 **A.** An agent would charge you a commission for providing that  
14 service for you. They would agree to the price with the used  
15 car lot to buy or sell your car, and you would pay that price  
16 plus the commission that the agent was going to charge you.

17 On a used car lot, you would negotiate with that  
18 used car lot and for a purchase price. What you wouldn't  
19 know is how much money the principal made because he may  
20 have -- if you were buying a car, he may have bought that car  
21 three years ago. He may have bought it for \$50 and sold it  
22 to you for \$100. All you know is you've agreed to buy that  
23 car for \$100.

24 **Q.** So when were you acting as an agent at State Street, what  
25 was your understanding as to the role you had for your

1 client?

2 **A.** Our role was to go and find the best execution for the  
3 client, given the nature of the trades that we had to do. We  
4 were acting in the client's best interest to go and find them  
5 the best -- the best price so that we could deliver the  
6 lowest cost for them.

7 **Q.** And when you're a principal, whose interest are you  
8 looking out for?

9 **A.** There's a conflict there. Because if you're on the used  
10 car lot, you've got an incentive to try to sell that car for  
11 as much as you can to make your profit as big as possible.

12 So where you're acting as principal in that  
13 scenario, it's difficult, there's certainly a conflict to  
14 manage there between giving the client the best price and  
15 maximizing your own profits on your lot.

16 **Q.** Did you see both types of models in the transition  
17 business at this time?

18 **A.** Yeah. Yeah, we did.

19 **Q.** And to your understanding, why would a client want a  
20 principal model?

21 MR. WEINBERG: I object.

22 THE COURT: What's the objection?

23 MR. WEINBERG: An expert may be able to tell us why  
24 a client would want something, but he's not the client. He's  
25 on the other side of these business transactions.

1 MR. JOHNSTON: He understands the industry and has  
2 to know the competition and how to distinguish his business  
3 from the competitor's business and how he interacts with  
4 clients. So he can testify to what his understanding of why  
5 his model was different and perhaps more advantageous than  
6 the principal model.

7 MR. WEINBERG: I would contend he can testify to  
8 certain clients and certain transitions, ones that are  
9 relevant, but not just some global understanding of clients  
10 in general. That's the province of an expert, your Honor.

11 THE COURT: He can testify to how it affected him  
12 with specific clients and how it affected him in specific  
13 things he did, but not globally about the industry.

14 BY MR. JOHNSTON:

15 Q. When you spoke to clients about State Street's model, how  
16 would you distinguish what you did between what a  
17 principal-based model would do?

18 MR. WEINBERG: It's irrelevant unless it's dealing  
19 with the clients that are subject matter of this case rather  
20 than clients in different years in different transitions  
21 under different circumstances.

22 MR. JOHNSTON: Your Honor, if I may?

23 THE COURT: Yes.

24 MR. JOHNSTON: Part of what needs to be -- the  
25 foundation needs to be laid is that the witness understood

1 the industry at the time. And so he's working on dozens of  
2 transitions every year, so to have him be able to testify as  
3 to what certain terms meant for a particular client, he needs  
4 to be able to --

5 THE COURT: Limited to the particular client. He  
6 can talk about his work generally, but not -- unless he's  
7 disclosed as an expert, not generally as an expert about the  
8 industry.

9 MR. JOHNSTON: Understood, your Honor.

10 BY MR. JOHNSTON:

11 **Q.** When you would distinguish State Street's model to  
12 clients in the 2010 time period, how would you do that  
13 compared to the principal model?

14 **A.** First and foremost, we would say that our model was an  
15 agency model. And that eliminated that conflict of interest  
16 between effectively dealing with our own used car lot. So we  
17 would make a big point of saying that we don't have that  
18 conflict so we don't have to manage it.

19 The easiest way to manage that conflict is to not  
20 have it, by using the agency route. There were still clients  
21 who liked to -- preferred to go down the principal route, but  
22 our pitch was we think the right model is to be the client's  
23 fiduciary and act as an agent.

24 **Q.** And what was your understanding of why some clients  
25 didn't prefer State Street's model?

1     **A.** Generally the biggest reason that I saw, certainly for  
2 clients choosing the principal route, was immediacy.

3             It does take some time, again, going back to the  
4 used car lot analogy, to go to all those used car lots to  
5 find the car you want. If you go to just one, it might not  
6 be exactly the car you want but it's close enough, you're  
7 done.

8             If you thought the price of cars was going to  
9 change a lot in the very near future, what you wanted to do  
10 was just get the car now, then some of them would go down  
11 that principal route in order to try and get things done more  
12 quickly.

13     **Q.** And what was your understanding of who bore the risk in  
14 an agency model?

15     **A.** Well, in an --

16             MR. WEINBERG: I object, again, Judge. This is  
17 squarely within 702.

18             THE COURT: Sustained just as to the form.

19     BY MR. JOHNSTON:

20     **Q.** Would you -- did you ever have discussions with clients  
21 about who would bear risk and how that risk could be  
22 minimized by using one model over the other?

23     **A.** Yes, we did.

24     **Q.** And what would you tell them?

25     **A.** That in an agency model, the risk of the market moving

1 around, so that opportunity cost element of the shortfall  
2 that I spoke about earlier, that is born by the client. That  
3 risk is theirs.

4 In a principal execution, that is born by the  
5 principal. So, again, if you go to a used car lot and they  
6 agree to buy your car from you, they then have the risk of  
7 being able to sell that car for more money. It might be that  
8 they sell it for less money and they have a loss. That's the  
9 risk transference that happens in a principal.

10 For agency, that risk lies with the client; and in  
11 the principal model, that would lie with the principal.

12 MR. WEINBERG: Judge, I don't want to interfere.  
13 May I have an objection, a motion to strike, and may I make  
14 it at the recess, the 702 objections?

15 THE COURT: Yes.

16 MR. WEINBERG: The witness has not been identified  
17 under that rule, and this is beyond --

18 THE COURT: You can have that.

19 MR. WEINBERG: Thank you, sir.

20 BY MR. JOHNSTON:

21 **Q.** I'd like to ask you a few more questions.

22 When you were at Credit Suisse, how many years did  
23 you work there in the transition management business?

24 **A.** For eight years.

25 **Q.** And how often did you interact with clients during those

1 years?

2 **A.** We were doing on average, I guess, 20 or so a year at  
3 Credit Suisse. Actual transitions, but interacting with  
4 clients kind of all the time, part of the marketing of the  
5 business.

6 **Q.** What was Credit Suisse's model?

7 **A.** It was an investment bank. We used an agency model, but  
8 Credit Suisse did have its own used car lot as well, I guess.  
9 It was one of the ones that we could trade with our own  
10 broker or we could trade in a purely agency way.

11 **Q.** Is that a hybrid between what you did at State Street and  
12 what you refer to as your principal competitors?

13 **A.** Yes, I guess in some way. Credit Suisse did have the  
14 ability to do principal trading in equities and bonds in a  
15 way that State Street didn't.

16 **Q.** So what did that mean for what you did as a transition  
17 manager there?

18 **A.** Well, from a project manager --

19 MR. WEINBERG: I object, your Honor.

20 Excuse me, Mr. Boomgaardt.

21 THE COURT: What's the objection?

22 MR. WEINBERG: Relevance.

23 THE COURT: Overruled.

24 MR. JOHNSTON: The question --

25 MR. WEINBERG: Again, the same objection. He's not

1       been noticed as an expert, his background has not been --

2               THE COURT: He's just describing, at least as to  
3       this question, as to what he actually did.

4               MR. WEINBERG: For Credit Suisse, years before.

5               THE COURT: Yes, that's the relevance I overruled.

6               MR. WEINBERG: Okay.

7               THE COURT: Go ahead.

8               You can answer the question.

9       BY MR. JOHNSTON:

10      **Q.** The question, Mr. Boomgaardt, was, when you were at  
11      Credit Suisse, how did the presence of, as you say, a used  
12      car lot at Credit Suisse affect what you did as a transition  
13      manager at Credit Suisse?

14      **A.** From the project management element of it, it didn't make  
15      too much difference. But it did -- we actively looked to  
16      find ways to manage that conflict, and to the point where we  
17      actually outsourced our bond dealing rather than doing it all  
18      with Credit Suisse's bond desk. We actually used the asset  
19      management desk so that we could access more counterparts in  
20      the market, different used car lots rather than just the one  
21      internally.

22      **Q.** While you were at Credit Suisse, what was the conflict  
23      that you faced as a transition manager?

24      **A.** It's the conflict between how much do we trade with our  
25      own business internally, so our own used car lot, and how



1 much do we go outside. And we would treat that used car lot  
2 as just one of the counterparties that we would look at. If  
3 we had the best price and that happened to be internally at  
4 Credit Suisse, then fine. But there is -- it is a conflict  
5 to manage.

6 **Q.** Did you approach what you did for your clients any  
7 differently when were you at Credit Suisse than when you were  
8 at State Street a few years later?

9 **A.** Not markedly, no. It was essentially a similar product.  
10 And what we were trying do at the end of the day was deliver  
11 that -- manage the risks and deliver as small an  
12 implementation shortfall as we could.

13 **Q.** When you were at State Street, did you face the same  
14 conflict that you did when you were at Credit Suisse?

15 **A.** No. State Street didn't have a principal bond trading  
16 business or to do principal trading in stocks either.

17 **Q.** Was that something that you highlighted to clients?

18 **A.** Yes, absolutely.

19 **Q.** How in general did State Street in this time period  
20 communicate these differences to clients?

21 **A.** Well, it was partially the job of the sales team to go  
22 out and talk to prospective clients about it. But also we  
23 would often get asked to prepare proposals and things for  
24 specific transactions, and in that, we would make sure that  
25 they realized that -- how the way we did it was, we viewed,

1 different than others and what our selling points were.

2 **Q.** When you arrived at State Street in 2008, was there  
3 already language for you about how to convey State Street's  
4 model to clients?

5 **A.** Yeah. State Street was already the biggest transition  
6 manager in the world before I started working there, so the  
7 selling points and how the business was set up was done years  
8 before I ever started working there.

9 **Q.** Did the way State Street's transition business presented  
10 itself to clients change at all from when you started in 2008  
11 to 2010?

12 **A.** Not to my knowledge, no.

13 **Q.** How would you describe how you generally represented  
14 yourself to clients in this time period?

15 **A.** As an agent and a fiduciary, so working on their behalf.

16 **Q.** Could you say what it means to be a fiduciary, in your  
17 understanding?

18 **A.** Sure. A fiduciary in the way that we were using it in  
19 those proposals was somebody who was acting in the client's  
20 best interest and putting the client's interest ahead of our  
21 own.

22 **Q.** Do you know whether the way you portrayed the London  
23 transition business differed from the way the American or the  
24 Asian transition business at State Street presented itself?

25 **A.** We were pretty common across the globe, but I wasn't

1 party to writing proposals for the U.S. teams or the -- or  
2 our Asian counterparts.

3 **Q.** Did anyone in Asia or America say things to you to make  
4 you think they were doing things differently over there?

5 **MR. WEINBERG:** Object.

6 **THE COURT:** Overruled.

7 **A.** No, no.

8 **Q.** And who is the global head of all these transition  
9 management businesses at State Street?

10 **A.** Ross McLellan was.

11 **Q.** Now, you stated that -- you testified that one of the  
12 things you did at State Street was highlight the advantages  
13 of a conflict-free model to the clients; is that right?

14 **A.** Yes.

15 **Q.** Did highlighting these advantages ensure you got all the  
16 business you wanted?

17 **A.** No, no, no. It was a competitive environment,  
18 unfortunately. No, we didn't win everything.

19 **Q.** And in your experience at this time, what did a lot of  
20 clients focus on?

21 **A.** A lot of clients were focused on those direct costs,  
22 particularly the commission charges that transition managers  
23 proposed to do these.

24 **Q.** Did they care about the implicit costs that you talked  
25 about, the opportunity costs, the market costs?

1     **A.** Of course they cared about them. And they needed to  
2 understand what the strategy was for managing those, the  
3 risks of those costs, but they're not things that you can  
4 negotiate.

5             What they negotiated on was commissions. That was  
6 the -- that was a big differentiator for winning and losing  
7 business.

8     **Q.** Did they negotiate on any other terms other than  
9 commission, to your knowledge?

10    **A.** Not usually, no. It was normal to have a debate and a  
11 negotiation around commission.

12    **Q.** You testified earlier that State Street's normal way --  
13 or maybe you just said transition manager's normal way of  
14 compensation was commission; is that correct?

15    **A.** Yeah.

16    **Q.** Was this any different at State Street from, say, Credit  
17 Suisse where you worked?

18    **A.** No. At Credit Suisse as well we normally got paid by  
19 per-transaction commissions.

20    **Q.** Was that the same for bonds as well as stocks?

21    **A.** It was at Credit Suisse, particularly once we moved to  
22 the sort of asset management way of dealing, although a lot  
23 of times when we were dealing -- there was also flat fees  
24 involved where people -- clients for lots of different  
25 reasons instead of having a per-transaction charge would want

1 to be invoiced afterwards for -- and have that cost separate  
2 rather than having it as a per-transaction charge.

3 **Q.** Would the flat fees be in addition to the commission  
4 charges?

5 **A.** No, no. Usually instead of. That was the way -- we  
6 generally didn't mind whether it was coming as a commission  
7 or as a flat fee, but our method for figuring out what that  
8 flat fee would be was starting with how much we thought the  
9 commission would be if we were charging in the normal way.

10 **Q.** Whether charged as a flat fee or a commission, was this  
11 something that you made up as you went or agreed upon in  
12 advance?

13 **A.** It was agreed with the client in advance. As I said, it  
14 was part of the negotiation.

15 **Q.** Are there other terms that are used for commissions in  
16 the bond market when you were working there?

17 **A.** Yeah. You would hear -- you would hear "spreads" and you  
18 would hear "mark ups" and "markdowns." Both of those in  
19 bonds were really synonymous with "commissions." They just  
20 describe the mechanic of how we took that commission, I  
21 guess, in a bond, where if we executed it, we would add or  
22 subtract or mark up or markdown our spread, if you like, and  
23 then book that net price out to the client. It's just -- it  
24 describes the mechanism for charging the commission.

25 **Q.** When you booked bond trades, did the markup or markdown

1 or spread, was that broken out separately?

2 **A.** Not generally, no.

3 **Q.** What about for equities? Was that the case for equities?

4 **A.** Equities, generally commissions would be shown  
5 separately, both in the reporting that we did and the  
6 reporting that went to the client via their custodian.

7 **Q.** Before 2010 at State Street, had you ever charged flat  
8 fees?

9 **A.** Yes, probably. It was becoming more prevalent in 2010  
10 certainly.

11 **Q.** How common was it compared to commissions?

12 **A.** Oh, vast majority are commissions. So if we were doing  
13 100 trades a year, maybe five or ten of them might have been  
14 flat fees. That sort of -- most of them would be on  
15 commission.

16 **Q.** I now want to direct your attention to the revenue  
17 expectations at State Street in the early 2010 time.

18 Were you aware of the revenue targets at State  
19 Street then?

20 **A.** I was for our business, yup.

21 **Q.** How did they compare year to year?

22 **A.** Well, as I said, we had a very good year in 2009, so our  
23 revenue -- the revenue expectations that were set for us were  
24 for growth on that 2009 revenue. So --

25 **Q.** How much growth was expected?

1     **A.** I can't remember exactly the numbers, but it was in the  
2     order of 10 or 20 percent, I think. But it's -- it was  
3     certainly a significant increase on what had already been the  
4     best year we had had.

5     **Q.** Did you think that that target was reasonable?

6     **A.** I thought it was going to be difficult. I thought,  
7     again, for the reasons I said, 2009 had been a bit of a  
8     perfect storm for us. We had done really, really well. It  
9     was going to be difficult to sustain that, given the market  
10    pressures that I described earlier. It was going to be  
11    difficult.

12    **Q.** Do you know who set the revenue goals at State Street at  
13    this time?

14    **A.** I don't know if there was a single person that set the  
15    goals. I guess my understanding of the way that it worked is  
16    it came from the top at a corporate level, divided into the  
17    various different business units, and filtered down through  
18    the management to the individual regions inside those units.

19               So in our case, I heard that budget from Ed  
20    Pennings who in turn got it from Ross McLellan. How it got  
21    broken up above that, I don't know.

22    **Q.** What role did the transition management desk in London,  
23    what role did its revenue play in the portfolio group's  
24    revenue?

25    **A.** The European business was important, but it was small in

1 comparison to what was being done in Boston. And Portfolio  
2 Solutions as well overall was a fairly small business unit  
3 inside what State Street was doing as a whole.

4 **Q.** To your knowledge, what were State Street's largest  
5 business units?

6 **A.** Well, asset management and custody were both bigger than  
7 even inside global markets. In global markets, you had  
8 securities, finance, foreign exchange, and Portfolio  
9 Solutions.

10 Both those other two businesses were bigger than  
11 Portfolio Solutions was, by quite some way, I believe.

12 **Q.** Do you have any idea of how much larger the two  
13 businesses were than Portfolio Solutions?

14 **A.** I can't recall.

15 **Q.** Did your business have anything to do with custody or  
16 asset management?

17 **A.** We talked to a lot of the same clients. So, yes, we did  
18 interact with them a lot, but it wasn't a -- those weren't  
19 locked in. They were, I guess, sources of leads for our kind  
20 of business.

21 **Q.** Do you know whether at this time in 2010 meeting revenue  
22 targets affected compensation for you and your team?

23 **A.** That was the understanding of everybody, that if you met  
24 your revenue targets or exceeded your revenue targets,  
25 certainly that was -- that was to be considered a very good



1 thing for your year-end compensation. And if you -- if you  
2 didn't meet those goals, then that's, all things being equal,  
3 a negative.

4 **Q.** What about promotion?

5 **A.** Same thing for promotion. If you want to -- it's always  
6 good to be in a business unit that's perceived to be doing  
7 well, and part of that is exceeding your revenue targets.

8 **Q.** In the transition management business at State Street,  
9 what percentage of your overall compensation would be in the  
10 form of an end-of-the-year bonus?

11 **A.** It really depends on what your seniority is in the bank,  
12 I guess. You know, for me certainly it was -- it was about  
13 50-50, in that kind of range. So 50 percent salary and  
14 50 percent year-end bonus.

15 **Q.** And did that go up or down as you were promoted?

16 **A.** Your bonus became the bigger part of your salary the more  
17 senior you became.

18 **Q.** And consequently more affected by revenue targets?

19 **A.** Yes, yeah.

20 **Q.** I'd like to show you an e-mail that's been marked as  
21 Government Exhibit 15 that's not been admitted into evidence.

22 **MR. JOHNSTON:** If we could just show it on the  
23 witness' monitor. If we can zoom in on the top, please.

24 **Q.** You recognize this e-mail --

25 **A.** I can't see it yet.

1 THE COURT: Is that on your monitor?

2 THE WITNESS: It's not.

3 THE COURT: Now?

4 THE WITNESS: No.

5 Now it is, yes.

6 THE COURT: Okay.

7 You can't see it, not yet. It's not in evidence.

8 BY MR. JOHNSTON:

9 Q. Do you recognize this document, Mr. Boomgaardt?

10 A. Yes, I do.

11 Q. And what is it?

12 A. It's an e-mail from Ross McLellan to the global Portfolio  
13 Solutions Group.

14 Q. And what's it dated?

15 A. It's dated March 22, 2010.

16 Q. And what's the subject line?

17 A. Year-to-date update.

18 MR. JOHNSTON: Your Honor, at this time, the  
19 government moves Exhibit 15 into evidence.

20 MR. WEINBERG: No objection.

21 THE COURT: Admitted.

22 (Exhibit No. 15 admitted into evidence.)

23 THE COURT: Now you should be able to see it.

24 MR. JOHNSTON: Can you please highlight the "From"  
25 field and the third name on the "To" field?

1 BY MR. JOHNSTON:

2 Q. Did you receive this e-mail, Mr. Boomgaardt?

3 A. Yes, I did. I'm one of the recipients.

4 MR. JOHNSTON: Can we zoom in to the text on the  
5 first line, first paragraph of this e-mail?

6 Q. I want to direct your attention to where it says, "It has  
7 been a challenging start of the year for Portfolio Solutions,  
8 although there are strong signs that the year is turning and  
9 that it is extremely important that we do so. While we will  
10 not meet our first-quarter financial goals, we have committed  
11 to meeting our budgeted goals for the rest of the year. We  
12 certainly do not want to forecast down further as this will  
13 not bode well for us such in areas as compensation and  
14 promotions later in the year."

15 Mr. Boomgaardt, what did you understand  
16 Mr. McLellan to be saying in this e-mail?

17 A. That it hadn't been a great start to the year for us. We  
18 hadn't met our quarterly budgets and, you know, we need to do  
19 better for the rest of the year or it will negatively impact  
20 compensation and the prospects for promotion.

21 Q. And this is March of 2010; is that correct?

22 A. Correct.

23 Q. And who are the -- did you notice when we looked at the  
24 recipient field, who were all the individuals who received  
25 this e-mail?

1       **A.** It was people from the global Portfolio Solutions team.

2       **Q.** So transition managers from all around the world?

3       **A.** Yes.

4                   MR. JOHNSTON: You can take this down.

5       **Q.** In light of the revenue challenges in early 2010, were  
6 there discussions in the London office about how to face  
7 these challenges?

8       **A.** Yeah, we had regular European management meetings,  
9 generally on a Friday, to discuss all bits of the business,  
10 what we were doing well, what needed to go better, and any  
11 ideas we had from increasing revenues.

12       **Q.** Who were part of those discussions?

13       **A.** Generally they were in Ed Pennings' office, so Ed would  
14 chair them. That European management committee would be  
15 myself, Paul McGee, and Ian Holden.

16       **Q.** Who is Ian Holden?

17       **A.** Ian Holden was our head of trading for our Portfolio  
18 Solutions Group in London.

19       **Q.** Where did he sit physically compared to you?

20       **A.** He sat right behind me, so our desks were almost back to  
21 back.

22       **Q.** What about Paul McGee? Who was he?

23       **A.** Paul McGee ran our interim asset management system. So  
24 sometimes clients would know which asset manager they didn't  
25 like anymore but they didn't know who they wanted to hire

1 yet. And we had a sort of side business that would allow  
2 clients to give us those assets, and we would manage them for  
3 a little while until they knew which asset manager they  
4 eventually wanted to hire.

5 So obviously very -- and we would manage them on  
6 a -- generally match the index or manage them on a passive  
7 basis. But that meant a transition from where they were to  
8 this passive portfolio and then another one from the passive  
9 portfolio to wherever they'd like to be. So very much  
10 interwoven with our transition management business.

11 **Q.** So the main management team in London was you, Ed  
12 Pennings, Ian Holden, and Paul McGee?

13 **A.** Yes.

14 **Q.** And these were the meetings that happened every Friday?

15 **A.** Yeah, pretty much every Friday. It was --

16 **Q.** Did anybody who was not based in London ever participate  
17 in these meetings?

18 **A.** Ross would if he was around, but that was, at most, a few  
19 times a year.

20 **Q.** What about over the phone?

21 **A.** Generally not. Occasionally I guess, but generally not.  
22 It was usually our management team in London.

23 **Q.** How would you generally receive your instructions from  
24 Boston? How were they communicated to you?

25 **A.** Generally they would come via Ed Pennings.

1       **Q.** And what would he tell you?

2       **A.** He would tell what had been relayed to him from Ross  
3       McLellan.

4               My interactions directly with Ross were periodic.  
5       I didn't speak to him on a daily basis. It was -- you know,  
6       the instructions were relayed down the chain of command from  
7       Ross to Ed to his management team.

8       **Q.** What was discussed in these management meetings in London  
9       in early 2010?

10      **A.** What our pipeline of deals looked like, where the  
11      business was going to come from, market trends, ways that we  
12      could evolve our business, you know, better reporting, and  
13      also ways that we can increase our revenue and how do we meet  
14      that competition that we're feeling in the market for --  
15      particularly for lower commissions.

16      **Q.** Was there anything about State Street's model at the time  
17      that made it difficult for you to increase your revenue?

18      **A.** Yeah. Generally speaking, the amount of trading that  
19      comes from transitions was in some ways worth more to an  
20      investment bank broker-dealer type of business. They have  
21      lots and lots of other clients; they're not just transition  
22      management business to rely on.

23               And transitions gave them a great excuse to go and  
24      talk to lots of those other clients, to say, actually:  
25      Listen, we've got a lot of trading going out on the desk

1 today. So if you're thinking of doing any trading, we're  
2 going to be a great call for you guys to come and do that  
3 trading.

4 So they could generate ancillary commission  
5 revenue, extra commission revenue, by dealing with some of  
6 their other clients.

7 State Street Portfolio Solutions business was  
8 really -- the trading was really dominated by transition  
9 management, so we didn't have that source of extra money,  
10 really.

11 **Q.** And you said that -- you testified earlier that the  
12 absence of these other businesses was one of the things you  
13 highlighted to clients.

14 **A.** Yeah, yup.

15 **Q.** But is it your testimony that that -- the absence of  
16 these other businesses also made it difficult for you to  
17 compete?

18 **A.** Yeah, it affected the economics of those trades.  
19 So there were people who could -- given the exact same  
20 transition that we had because they had set themselves up  
21 differently, could make money in different ways than we  
22 could. So they could do it and quote the client a lower  
23 upfront commission than we could.

24 **Q.** Could you summarize in your own words what was State  
25 Street's model in early 2010?

1     **A.** It was the same as it had always been. We were an agent.  
2     We were acting in a fiduciary capacity, so nothing had  
3     changed in the way that we were marketing ourselves.

4     **Q.** Did there come an opportunity in early 2010 to abandon  
5     this approach?

6     **A.** Yes.

7     **Q.** And when did that happen?

8     **A.** It was, I guess, with regards to a transition that we had  
9     been asked to quote for where the client had specifically  
10    asked to see no commissions. So that we would have to -- in  
11    order to win the transition, we would have to do it for zero  
12    commission.

13    **Q.** Who was this client?

14    **A.** It was the KIA, the Kuwait Investment Authority.

15    **Q.** What is the KIA?

16    **A.** It's a big fund set up by the Kuwaiti government. It's a  
17    sovereign wealth fund, a government wealth fund in Kuwait.

18    **Q.** How big are we talking in terms of assets managed?

19    **A.** I'm not sure anybody knows exactly how big it is, but  
20    it's big, one of the biggest in the world.

21    **Q.** Billions of dollars?

22    **A.** At least, yeah.

23    **Q.** How significant of a client was KIA to State Street?

24    **A.** They were a significant client across lots of businesses.  
25    We had done from a transition management perspective plenty



1 of transitions for them before. But they also touched State  
2 Street across asset management, custody, lots of other  
3 businesses. They were a big client of State Street's in  
4 general.

5 **Q.** Who was the relationship person at KIA for State Street's  
6 transition team?

7 **A.** So it was a man called Das, who was our main contact  
8 there.

9 **Q.** Who was Das?

10 **A.** He was the person at KIA whose job it was to select and  
11 make recommendations about which transition manager they  
12 should use when they had transitions to do. He may have  
13 other jobs as well, but that was the one that he  
14 interacted -- where he interacted with us.

15 **Q.** Was he from Kuwait?

16 **A.** No, no. He wasn't Kuwaiti.

17 **Q.** Where was he from?

18 **A.** He's Indian, I believe.

19 **Q.** Do you know whether he had authority to award you  
20 business at State Street?

21 **A.** My understanding was that he gave recommendations to his  
22 superiors. So he wasn't the one making the decisions, but he  
23 was the one recommending.

24 **Q.** Who was the person at State Street who interacted most  
25 frequently with Das?

1     **A.** Ed Pennings. So Ed had sales and client relationship  
2     responsibility for KIA for our Portfolio Solutions business.

3     **Q.** How knowledgeable was Das about transition management?

4     **A.** He wasn't our most sophisticated client, I guess is  
5     probably the best way to put it.

6     **Q.** And why do you say that?

7     **A.** He seemed very fixated on commissions rather than the  
8     overall cost of his transitions. And explaining to him that  
9     if anybody's charging you a zero commission, they're going to  
10    be making -- they're going to have to make some money off  
11    this somehow; otherwise it's going to -- it's a loss leader  
12    business.

13                 But also his understanding of things like  
14    opportunity cost and agency trading and where that risk lies,  
15    all of those were difficult conversations that we had to have  
16    with him. And I'm not convinced that he was, I guess, as  
17    well grounded in those financial concepts as some of our  
18    other clients were.

19    **Q.** So you're talking about the difference between implicit  
20    costs and direct costs?

21    **A.** It's kind of all that stuff, I guess, yeah.

22    **Q.** Had other clients asked you questions about what's the  
23    difference between the two?

24    **A.** Some of them would, yeah. We dealt with some very  
25    sophisticated clients. You know, Das was -- seemed to be a

1 bit more -- a bit more mechanical in looking for a single --  
2 a single measure to try and make his decisions. And he  
3 seemed to think that whoever offered the lowest commission  
4 would be the one who ultimately gave him the best outcome.

5 **Q.** Was there a particular transition where he didn't seem to  
6 understand the results you had provided?

7 **A.** Yes. I mean, right before I lost my job at State Street,  
8 yes, we had done a transition for them and I needed to fly to  
9 Kuwait to explain to him the outcomes.

10 **Q.** What did you have to explain to him?

11 **A.** That the opportunity cost, the risk of the market moving  
12 around was something that he bore because we were -- we were  
13 an agency-only model. And it became a relationship issue  
14 inside State Street that he didn't understand it or didn't  
15 like the fact that the markets had moved slightly against  
16 them so it was a cost to the fund.

17 **Q.** Had State Street had any control over what the markets  
18 had done?

19 **A.** No, no.

20 **Q.** Is that a type of question that other clients would ask  
21 you, whether you --

22 **A.** Conversation -- I've never had to go and explain it to a  
23 client once -- I hadn't had a client that had as much  
24 difficulty understanding that concept, I guess, as what Das  
25 had.

1     **Q.** How many times had you already done transitions for KIA  
2     and Das when you were having this conversation?

3     **A.** Multiple, probably double digits.

4     **Q.** What was the first opportunity that KIA presented to you  
5     to abandon your prior approach?

6     **A.** It was this bond transition, I guess, that I was  
7     describing. He -- we were one of the preferred providers for  
8     KIA, so he would have a list of transition managers that he  
9     would ask to quote. He would give an outline of what was  
10    involved in the upcoming transaction and ask for a quote  
11    back. And on this particular one, he told Ed that it had to  
12    be done for zero commission or we wouldn't win it.

13    **Q.** How did you learn of the possible deal with KIA?

14    **A.** Well, via Ed. Those leads, if you like, came in via Ed.

15    **Q.** And how large a transaction are we talking about?

16    **A.** It was large, several billion dollars' worth of bond  
17    trading.

18    **Q.** What -- how did the revenue prospects of a large  
19    multibillion dollar transition compare to some of the -- an  
20    ordinary one you would do?

21    **A.** In the normal course of business, if you were charging a  
22    per-transaction commission, the more you have to trade, the  
23    more money you make. So in our business in transition  
24    management, big trades were the ones you wanted to win. They  
25    were the elephant deals that we liked to go after. They were

1 the ones that really generated the revenue.

2 **Q.** So if an elephant deal was, say, ten times larger than a  
3 normal deal, would it require ten times as much work?

4 **A.** No, not necessarily. There were elephant deals that  
5 actually required less work than some of the smaller ones.  
6 The amount of work wasn't necessarily related to how much  
7 money was made or how much commission was charged.

8 **Q.** So how could these elephant deals play into meeting the  
9 revenue target for the London desk?

10 **A.** Sure, the revenue -- the elephant deals, the big ones, if  
11 you look at any year and look at what the drivers were of  
12 revenue, there's always a few deals that are -- that are big.  
13 The bigger deals make more money, so they're important.

14 **Q.** You testified just a moment ago that State Street  
15 couldn't do a transition for zero commissions.

16 **A.** Well, we could. We would lose money doing it for zero  
17 commissions. We have costs we need to cover. We could do it  
18 for zero but it would mean losing money.

19 **Q.** Did you know whether banks were doing it for zero  
20 commissions?

21 **A.** We had heard of them doing it for zero.

22 **Q.** Had you heard they would be taking a loss?

23 **A.** We suspected that people who were either newly coming  
24 into the market or re-establishing themselves would be --  
25 some might be happy do it as a loss leader to get the KIA's

1 business.

2 **Q.** Why would they be willing to do this? What was your  
3 understanding?

4 **A.** It credentializes them as a transition manager. They  
5 can -- one of the things that people like to talk about is  
6 how many transitions you do and what volume of assets you  
7 transition. That's one way to get a volume of assets that  
8 you're doing up, which is -- again, becomes part of the  
9 marketing for your next transition. You know, we're great  
10 because we do lots and lots of trading. That's a great way  
11 to do lots and lots of trading. It adds a value from a  
12 marketing perspective for those guys, particularly newer  
13 entrants.

14 **Q.** So a short-term loss but a long-term gain?

15 **A.** Yes.

16 **Q.** Did you have an understanding of why KIA expected to pay  
17 zero?

18 **A.** I don't know. I'm not sure.

19 **Q.** Did you know at the time whether other banks were  
20 pitching low fees to KIA's business in particular?

21 **A.** Our understanding was there were other banks already  
22 pitching zero to KIA, yeah.

23 **Q.** Did State Street end up pitching for this deal?

24 **A.** Yes, we did.

25 **Q.** What did you pitch?

1     **A.**   Zero commission.

2     **Q.**   Were you going to do it for free?

3     **A.**   Nope.

4     **Q.**   Then how were you going to make your money?

5     **A.**   We were going to take a commission anyway but not show it  
6       to the client.

7     **Q.**   How would you take it without showing them?

8     **A.**   Well, in bond trades, you don't normally show the  
9       commission, in any event. So the instruction that goes to  
10      the client's custodian -- so a fund like the KIA will have  
11      a -- will employ a custodian who is the safe-keeper of  
12      their assets, that effectively holds the assets on behalf of  
13      the -- on behalf of the KIA.

14                 And when we trade for them in a transition, we need  
15      to instruct them as to what we've traded. And that  
16      instruction really becomes the kind of records of the fund  
17      for the KIA. And those instructions that would go out would,  
18      only for bond trades, have the net price, not a commission.  
19      So all they would see was the price that already had our  
20      commission baked into it.

21     **Q.**   So with only seeing one price, it would be impossible to  
22      know what the commission was?

23     **A.**   Yeah, yeah.

24     **Q.**   Had you ever before this deal charged commissions on  
25      clients that you hadn't told them about?

1     **A.** Certainly I hadn't.

2             MR. WEINBERG: I object, your Honor. There's no  
3 evidence that he hadn't -- no evidence that Mr. Das did not  
4 know and was not told about.

5             THE COURT: I'm not sure the objection -- as to  
6 whether he's done it.

7             MR. JOHNSTON: The question to the witness was, had  
8 he ever personally charged commissions without having  
9 disclosed them to the clients before.

10            THE COURT: You can answer that.

11            THE WITNESS: I hadn't, no.

12     BY MR. JOHNSTON:

13     **Q.** Did it concern you that you were going to do it here?

14            MR. WEINBERG: Object. There's no predicate for  
15 the question that he was going to do it here. There's no  
16 predicate that Mr. Das didn't know.

17            MR. JOHNSTON: That's not the --

18            THE COURT: That's overruled.

19     BY MR. JOHNSTON:

20     **Q.** Did it concern you that you were going to charge  
21 commissions without disclosing them to the client?

22     **A.** Yes. Yes, it did.

23     **Q.** And why did it concern you?

24     **A.** Well, because I had been in the business for quite a long  
25 time by that point, and I had never been in a situation where



1 we had to figure out our own commission, if you like. And  
2 it's -- it's -- yeah, it didn't feel like the right thing to  
3 do, and it was very different from anything that I had seen  
4 before.

5 **Q.** Where did this decision come from at State Street?

6 **A.** Well, my understanding is it came from Ed and Ross.

7 **Q.** And who told you that?

8 **A.** Ed did.

9 **Q.** Did you know whether Das was told anything about how  
10 State Street would make its money?

11 **A.** Yes. I did walk into a conversation that Ed was having  
12 with Das in his office where Ed did tell him if we charge  
13 zero for this, we're going to have to take a spread.

14 **Q.** Did he say we're going to take a spread out of the money  
15 you would otherwise make?

16 **A.** Not in the bit that I heard, no. It was we will take a  
17 spread on this. That was as far as that conversation went,  
18 or at least the bit that I heard.

19 **Q.** So you didn't hear one way or the other whether he said  
20 it was going to come out of KIA's pocket or some other  
21 client's pocket?

22 **A.** Not in that conversation, no.

23 **Q.** I'm going to play you a phone call shortly, but before I  
24 do, I'd like to ask you a few questions.

25 Were any phone lines recorded at State Street?

1       **A.**   Yes.

2       **Q.**   Whose phone lines were recorded?

3       **A.**   Well, in our group, all of my analysts that worked for me  
4       had their phone lines recorded, and the trading desk I  
5       believe had their phone lines recorded as well.

6       **Q.**   Was your line recorded?

7       **A.**   Yes.

8       **Q.**   What about Ed Pennings' line?

9       **A.**   Ed's office phone I don't believe was recorded, no.

10      **Q.**   What about Ross McLellan's phone?

11      **A.**   I don't know. Not sure.

12      **Q.**   Do you know why yours -- your phone and the analysts and  
13      the traders phones were recorded?

14      **A.**   We would sometimes take orders from clients, and if there  
15      was a dispute with a client about what they wanted to trade  
16      or whether it was a buy or a sell or any of those things, it  
17      was good practice to have them recorded.

18      **Q.**   Were you aware at the time that your phones were being  
19      recorded?

20      **A.**   Yeah, yeah I was. We specifically asked for them to be  
21      recorded because we did have -- we did have an instance where  
22      we needed to go back to a tape and didn't have it, so we  
23      didn't have the recording, so as part of an office move it  
24      had been overlooked. But, anyway, it was one of the things I  
25      checked on a monthly basis to make sure we were being

1 recorded.

2 MR. JOHNSTON: Your Honor, at this time permission  
3 to approach the witness.

4 THE COURT: Yes.

5 BY MR. JOHNSTON:

6 Q. Mr. Boomgaardt, do you recognize the disks I've handed  
7 you?

8 A. Yes.

9 Q. Could you take a moment and look through the stickers on  
10 each disk?

11 MR. JOHNSTON: For the record, I have handed the  
12 witness disks that are separately marked as Government  
13 Exhibits 10, 24, 30, 32, 43, 80, 191, 193, 195, 196, 197.

14 Q. Do you recognize these disks, Mr. Boomgaardt?

15 A. Yes, I do.

16 Q. What are they?

17 A. They are disks that hold voice recordings, and those  
18 stickers have my initials and the date that I listened to  
19 those.

20 Q. Have you reviewed the contents on each one of those  
21 disks?

22 A. Yes.

23 Q. And are each -- are there recordings on each one of those  
24 disks?

25 A. Yes.

1     **Q.** Are you a participant on the recordings on each one of  
2     those disks?

3     **A.** Yes, I am.

4     **Q.** And were those recordings made at the time that you were  
5     employed at State Street in the 2010-2011 time period?

6     **A.** Yes, they were.

7     **Q.** Do they fairly and accurately capture the conversations  
8     that you had at the time?

9     **A.** Yes, they do.

10           MR. JOHNSTON: Your Honor, at this time the  
11     government moves to admit Exhibits 10, 24, 30, 32, 43, 80,  
12     191, 193, 195, 196, and 197.

13           MR. WEINBERG: No objection.

14           THE COURT: Admitted.

15           (Exhibits No. 10, 24, 30, 32, 43, 80, 191, 193,  
16     195, 196, and 197 admitted into evidence.)

17           MR. JOHNSTON: Your Honor, at this time permission  
18     to distribute to the jurors transcripts of these calls and  
19     ask the Court to give an instruction.

20           THE COURT: Let me give an instruction to the jury.

21           The evidence is the disks, the actual recordings of  
22     which you'll hear. What you're receiving now are notebooks  
23     which have transcripts of those conversations. The  
24     transcripts are simply to aid you in listening to the  
25     evidence, which is the phone calls, the recordings. If you

1 find there's a difference between the recordings and the  
2 transcripts, it's the recordings rather than the transcripts  
3 that govern. And you'll see a number of tabs in your  
4 notebooks, and that's because there's a number of recordings  
5 that I anticipate the government will play.

6 BY MR. JOHNSTON:

7 **Q.** Mr. Boomgaardt, you also have a binder in front of you.

8 If I could direct your attention to tab 10, have  
9 you reviewed the transcript that's behind Government  
10 Exhibit -- behind tab 10?

11 **A.** Yes.

12 **Q.** And have you reviewed it to see whether it is an accurate  
13 capturing of the phone call that's on Government Exhibit 10?

14 **A.** Yes.

15 **Q.** And is it?

16 **A.** Yes, I believe it is.

17 **Q.** And how do you know that this is the same transcript that  
18 you reviewed?

19 **A.** It's got my initials and date on the top of the first  
20 page.

21 MR. JOHNSTON: Your Honor, could we please play  
22 Government Exhibit 10?

23 (Played recording.)

24 **Q.** Mr. Boomgaardt, do you recognize any of the voices on  
25 that call?

1     **A.**   Yes.

2     **Q.**   Who are they?

3     **A.**   It's myself and Ed Pennings.

4     **Q.**   And what are the two of you talking about?

5     **A.**   Specifically they're talking about the -- a transition  
6       coming up for KIA.

7     **Q.**   And directing your attention to where Mr. Pennings says,  
8       "The KIA better be a bond target," what's your understanding  
9       of what he means there?

10    **A.**   He wants it to be a bond transition so that it's -- our  
11       understanding was it was a bond transition, so that's --  
12       that's what he's hoping for.

13    **Q.**   What specifically about it being a bond target as opposed  
14       to what?

15    **A.**   We knew that the assets it was coming from were bonds,  
16       and --

17    **Q.**   What do you call the -- is that the legacy?

18    **A.**   Yeah, the legacy is the existing portfolio; the target is  
19       where they're going to. So we knew the legacy portfolio was  
20       treasuries, but I guess at this point we didn't know for  
21       definite that it was going to bonds or equities or anything  
22       else.

23    **Q.**   And what was your understanding of why Mr. Pennings  
24       wanted a bond target as opposed to a stock target?

25    **A.**   Bond transitions in general tended to be better

1 opportunities for us to make money. We could charge a  
2 relatively higher commission on bond trades than we could on  
3 equity trades.

4 **Q.** What about how bond prices were reported?

5 **A.** That, too. Bonds -- you know, bond prices only go back  
6 as a net price so they don't -- clients don't have a  
7 visibility on that commission either.

8 **Q.** So what would that enable you to do?

9 **A.** Well, it would enable us to take a commission on this  
10 anyway, even if we hadn't agreed one.

11 MR. JOHNSTON: If we could continue, please.

12 (Played recording.)

13 **Q.** Mr. Boomgaardt, who are you and Mr. Pennings talking  
14 about?

15 **A.** Talking about Das, so our contact at the KIA.

16 **Q.** And why does -- why does the term "duration" come up?

17 **A.** It's -- for bond portfolios, the economics for us as a  
18 transition manager to doing bond transitions were better for  
19 portfolios that were longer dated. The conventions in the  
20 bond market was to charge a commission based on yield rather  
21 than price, and this is --

22 **Q.** Could I pause you for a second and maybe just help the  
23 jurors understand?

24 What does it mean to have a long-dated bond?

25 **A.** A bond that doesn't expire for a number of years. It

1 doesn't mature for a number of years. Bonds are -- they're  
2 an obligation to pay money, a coupon every month or year for  
3 a certain period of time. And then you pay back all of the  
4 money that you've borrowed, and that could be -- it could be  
5 anything from 30 days to 50 years from now. And the duration  
6 of a portfolio -- in simplest terms, everything else being  
7 equal, the longer until that final payment's made, the longer  
8 the duration of the bond is.

9 **Q.** And why is there then a mention of it's tough to  
10 calculate duration on your little adding machine? What do  
11 you mean by that?

12 **A.** Das is famous for having an old-fashioned adding machine  
13 with the little bit of paper on his desk in the KIA. That's  
14 a, I guess, poorly worded inside joke about possibly his  
15 sophistication and not understanding.

16 Duration is not a particularly easy thing to  
17 calculate. For those of you who know calculus, it's the  
18 first derivative of the price equation for a bond. And if  
19 your eyes glaze over when I say that, it's because it's not  
20 that easy. It's not easy to calculate, but it's reasonably  
21 easy to understand if you're a bond -- if you're doing things  
22 in the bond market.

23 **Q.** How many of your clients, in your experience, understood  
24 what duration was?

25 **A.** Well, bond managers, certainly anyone that's managing



1 bonds knew what that was. I wouldn't necessarily expect  
2 somebody in Das' position who's choosing asset managers and  
3 transition managers to necessarily understand what duration  
4 is. But if you've got an interest in the markets and in bond  
5 portfolios in particular, you should understand that. It's  
6 pretty fundamental.

7 **Q.** What, if anything, did duration have to do with the  
8 amount of money you could earn?

9 **A.** So bond market convention was to charge a commission  
10 based on the yield of a bond. So the simplest way to think  
11 of that is a specific price for a bond means that it's going  
12 to yield a certain amount to maturity.

13 The duration is the relationship between any  
14 changes in yield to what it means for the price of the bond.  
15 So it's a measure of the sensitivity of the price of the bond  
16 to small changes in the interest rate or yield of the bond.

17 And so if you're charging a commission on yield,  
18 you need to multiply that commission you're charging times  
19 the duration to get what effect that has on the price. So  
20 it's a little bit complicated, but what it means is a  
21 longer-duration portfolio for the same quoted commission will  
22 mean more money for -- more money for State Street. So the  
23 longer the duration, the more money that State Street could  
24 make in commission on those trades.

25 **Q.** So, for example, a 1 basis point of yield, that could --

1     how would that compare between, say, a bunch of 2-year bonds  
2     and a bunch of 20-year bonds?

3     **A.**   Sure, so if 1 basis point of yield on a bond that only  
4     had a 1-year duration would only be 1 basis point of price  
5     commission; whereas if it was a bond that had a 15-year  
6     duration, that 1 basis point of yield would mean 15 basis  
7     points of commission that would get taken.

8     **Q.**   So 15 times as much commission potentially?

9     **A.**   Fifteen times as much commission.

10    **Q.**   So when Mr. Pennings says, "I was just going to say -- go  
11    to the department and give me the one with the biggest  
12    duration," what do you understand him to mean?

13    **A.**   We wanted -- we're equating duration to commission  
14    revenue or revenue to State Street. So the longer the  
15    duration, the bigger the -- the more money we can make as --  
16    for our business.

17                 MR. JOHNSTON: Continue, please.

18                 (Played recording.)

19    **Q.**   Mr. Boomgaardt, what do you understand Mr. Pennings to  
20    mean when he says, "I mean, we are going to make our quarter  
21    with this, even with 2 billion"?

22    **A.**   That this will be a transition that we're going to make  
23    lots of money for, and that will get us on course for meeting  
24    our quarterly revenue targets, despite the fact that they've  
25    actually split the transition so it's half as big as we

1 thought it was going to be.

2 **Q.** Where is the other half of the transition going?

3 **A.** According to Mr. Pennings, it went to Nomura, who was one  
4 of our competitors.

5 **Q.** So what's the -- at least what's being discussed here,  
6 what's the size of the -- total size of bonds that are being  
7 given to State Street?

8 **A.** It's a \$2 billion portfolio, roughly.

9 **Q.** How many -- in London in any given year, how many  
10 multibillion-dollar transitions would you do?

11 **A.** Less than ten, probably less than five, probably --  
12 between five and ten I guess on a good year, but certainly  
13 not more than ten.

14 **Q.** So this is one of those elephant deals?

15 **A.** This is an elephant deal.

16 **Q.** And why do you say -- sorry. What's your understanding  
17 of what Mr. Pennings means what he says, "I can't do equity  
18 for zero, can I"?

19 **A.** That if we do agree to do an equity trade for zero, so,  
20 i.e., trading stocks, we're going to lose money on that.  
21 It's below what our cost is to provide that service.

22 **Q.** How can you do -- why can't you do equities for zero when  
23 you're doing bonds, at least nominally, for zero?

24 **A.** Well, bonds we have this mechanism to take a commission,  
25 to take a spread anyway.

1           That doesn't exist in the equities business in the  
2           same way. That would get captured on whatever we're sending  
3           out to the client's custodian and in the reporting, so they  
4           would see it as an additional commission.

5           (Played recording.)

6           **Q.** Mr. Boomgaardt, why do you -- why do you say, "How else  
7           can we structure our commissions so it doesn't look like a  
8           commission?"

9           **A.** Well, if for whatever reason he doesn't want to see a  
10          headline commission number, is there another way that we can  
11          still tell the client and they understand that we're still  
12          going to be making money from it, but is there another way  
13          that we can still make that an economic trade for us somehow.

14          **Q.** And when Mr. Pennings says, "Can we price at net?" what  
15          do you understand him to mean?

16          **A.** The price at net is kind of what we're talking about.  
17          Can we do the same thing with bonds? Can we just give them a  
18          single price that they see that doesn't show a commission.

19          **Q.** And what do you understand Mr. Pennings to say when he  
20          goes, "I'm not going to get called out for saying, you know,  
21          you already say -- you always say this and yet you are doing  
22          it yourself"?

23          **A.** It was part of what we used to say to clients. And  
24          Mr. Pennings in his pitch that if all you care about is  
25          commission, somebody is going to be taking a spread, a hidden

1 commission from you in another place. So you should stop  
2 caring so much about commissions or doing it for zero  
3 commission because you're paying for it anyway. And he feels  
4 that there's a risk of him being hypocritical here, and that  
5 we are doing exactly that. So he's saying he's going to put  
6 it in the legal agreement so it's clear to the client.

7 **Q.** And is that what he means by "periodic notice"?

8 **A.** Yes, yes. So in transitions, normally we would have a  
9 master agreement, what we call a TMA, the transition master  
10 agreement. So that that allowed us clients who were regular  
11 transition management clients, we wouldn't have to negotiate  
12 a new legal agreement every time. That would set the broad  
13 legal structure for how we would deal with each other. And  
14 then each individual transition would have a periodic notice,  
15 generally a page or two, that would set out the specifics of  
16 that transaction. That's the periodic notice. That would  
17 get signed separately for each transition that we do for  
18 them.

19 **Q.** You testified that it was part of Mr. Pennings' pitch to  
20 clients that competitors could potentially be charging hidden  
21 commissions; is that correct?

22 **A.** Yup.

23 **Q.** Do you have any knowledge whether clients were receptive  
24 to that when they -- when you tried to disparage competitors?

25 **A.** Generally my experience was they're not, that disparaging

1 competitors in negative marketing is not generally  
2 particularly well received by clients.

3 **Q.** So was it effective to discredit the competitors?

4 **A.** I mean, I guess we were still getting business, so it  
5 wasn't totally ineffective. But it's certainly not my  
6 preferred way of -- I prefer to talk about the benefits of  
7 our model rather than the problems with other people's.

8 **Q.** So when you say it's just -- "If it's just a different  
9 way they want us to capture our revenue, I'm not sure that is  
10 the end of the world, if we find a way around -- as long as  
11 we -- you know, if we tell him that is how we are going to be  
12 taking it, we are probably covered."

13 What are you saying right there, Mr. Boomgaardt?

14 **A.** Thinking out loud, really. But if we have an agreement  
15 with the client about how and what we're going to take, is  
16 there a way to structure it so it doesn't come up as a  
17 commission. But as long as the client is aware of how and  
18 what we're taking, there may be a way to do that. But I  
19 don't know. It's thinking out loud there.

20 **Q.** So if the client knows you're charging a hidden  
21 commission, then it could be okay?

22 **A.** Well, it's certainly not okay if they don't know you're  
23 taking a hidden commission.

24 **Q.** Would it still be hidden if they know?

25 **A.** No. But I guess it's a fact -- it's both the mechanism

1 and the size, I guess, is the bit that may well be hidden or  
2 not. It's the ability to take it but also what you're taking  
3 and how you're taking it.

4 **Q.** Do you know whether the size of commission that you ended  
5 up taking or were planning on taking for the KIA was  
6 disclosed in the periodic notice?

7 **A.** It wasn't disclosed in the periodic notice, as far as I  
8 know.

9 **Q.** Do you have an understanding one way or the other whether  
10 Das knew the amount of commission that you were going to  
11 take?

12 **A.** I don't believe he did know the amount of commission that  
13 we were going to take, no. I don't think we knew exactly the  
14 amount of commission we were going to take when they signed  
15 the periodic notice, so I don't know how he would.

16 (Played recording.)

17 **Q.** Mr. Boomgaardt, you just testified that you may not have  
18 a problem doing this if everything is disclosed to the  
19 client, correct?

20 **A.** Yes, correct.

21 **Q.** What do you understand Mr. Pennings to be saying here  
22 when he says, "Don't talk about it with anyone that we are  
23 doing it this way because that is not going to help our  
24 story"?

25 **A.** I think he's recognizing that we're deviating from the

1 way that we normally conduct ourselves, and we'd rather that  
2 the client and the market didn't know that. That's -- it's  
3 not the State Street way of doing things.

4 **Q.** How did you want to continue presenting yourself to the  
5 market?

6 **A.** Well, in same way that we were before, in our  
7 unconflicted manner. And this would -- I think, as Ed  
8 identified earlier in the call, it puts us in a position of  
9 being a bit hypocritical.

10 **Q.** So when Mr. Pennings says, "Don't even share it with the  
11 rest of the team, to be honest," what do you understand him  
12 to mean there?

13 **A.** Let's keep this to a close-knit group so it -- so that  
14 that information will reduce the risk of that information  
15 getting out further to other people in the bank but also the  
16 market more broadly.

17 **Q.** So who's the team that he's referring to here?

18 **A.** My team.

19 **Q.** And who would that include?

20 **A.** The transition managers that work for me.

21 **Q.** He mentioned Paul. Who's Paul?

22 **A.** Paul McGee.

23 **Q.** So one of the four individuals you testified participated  
24 in these management meetings?

25 **A.** That's right, yeah.



1     **Q.** And when you say, "Well, I'm going to be away right at  
2     the end of the deal," so what are you referring to there?

3     **A.** I'm going to be away, so it won't be me managing this  
4     transition. I won't be the point person.

5             Every transition had a project manager, a  
6     transition manager assigned to it, and that would be -- part  
7     of my job was to assign my transition managers to the various  
8     different deals. So all I'm saying here is it's going to be  
9     somebody in my team. This isn't going to be me doing it  
10    because I'm not going to be here to see the whole thing  
11    through.

12    **Q.** So someone is going to have to be clued in here?

13    **A.** Yes.

14    **Q.** What does Mr. Pennings say after that?

15    **A.** He says they don't need to know what's in the  
16    documentation. So they don't need to know what's been agreed  
17    with the client. They'll approach it in the same way they  
18    will every other transition, which is fairly consistent with  
19    how my transition managers did their job. Their job was to  
20    manage the risks and project manage the whole thing. It  
21    wasn't to agree commission rates with the clients. That all  
22    set with the sales team that Ed ran.

23    **Q.** Was this typical for you, keeping secrets from your own  
24    team?

25    **A.** No, no, it wasn't. I'm -- generally, no. We went

1 through -- everything was generally very open. We had a  
2 weekly meeting with all of my analysts where we talked  
3 through all of the deals. It's easier that way to get  
4 everybody's -- the best of everybody's ideas for all of the  
5 transitions.

6 **Q.** Were you uncomfortable with keeping it a secret?

7 **A.** Yeah, yeah. Again, it's different and I didn't -- in my  
8 career in transition management, I hadn't been in a situation  
9 where I had to keep things quiet from my team.

10 **Q.** Did you end up getting the KIA deal?

11 **A.** Yes, we did.

12 **Q.** With the zero commission pitch?

13 **A.** Yup.

14 **Q.** Did the actual trading happen right then in March 2010 or  
15 did it happen later?

16 **A.** No, it was delayed for a little bit.

17 **Q.** Were you involved in the actual execution of the trades?

18 **A.** Yes. I mean, the trading actually gets done by the  
19 traders, but in terms of -- I was very hands-on with that  
20 transition, yes.

21 **Q.** Where were you when this happened?

22 **A.** In London.

23 **Q.** What month are we talking about?

24 **A.** When did KIA happen? It was, I guess, towards mid-end  
25 2010.

1     **Q.** Did anyone else -- was anyone else helping you in London  
2 with managing this transition?

3     **A.** Yeah, I had people in my team helping me. But from a big  
4 perspective, yeah, Ed, and Ross McLellan was actually in town  
5 when the transactions happened as well, when the actual  
6 trading day happened.

7     **Q.** Do you know whether that was happenstance or deliberate?

8     **A.** I think it was happenstance. I don't remember it  
9 necessarily being deliberate. But, I mean, Ross did visit  
10 the offices on a global basis on a periodic basis, so he  
11 wasn't -- he wasn't often in London, but it wasn't that  
12 unusual either.

13     **Q.** How did --

14             THE COURT: Let me stop you here, Mr. Johnston.

15             Ladies and gentlemen of the jury, it's 1:00, so  
16 we'll break for the day. I remind you keep an open mind, you  
17 haven't heard all the evidence. Don't discuss the case among  
18 yourselves, don't discuss it with anyone else, don't do any  
19 independent research. I'll see you tomorrow morning. We'll  
20 begin trial at 9:00 a.m. tomorrow morning, so please be here  
21 a few minutes early so we can begin at 9:00. Thank you for  
22 your attention.

23             All rise for the jury.

24             (Jury left the courtroom.)

25             THE COURT: Please be seated.

1           That objection you want to put on the record, can  
2           you do that tomorrow morning at 8:30?

3           MR. WEINBERG: Of course, your Honor.

4           THE COURT: Anything else before we adjourn?

5           MR. FRANK: Not from the government.

6           THE COURT: Okay. I'll see you tomorrow morning at  
7           8:30. Thank you very much. We're adjourned.

8           See you tomorrow, Mr. Boomgaardt.

9           (Court adjourned at 1:01 p.m.)  
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CERTIFICATION

We certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of our skill and ability.

/s/Debra M. Joyce                      June 5, 2018  
Debra M. Joyce, RMR, CRR, FCRR      Date  
Official Court Reporter

/s/Rachel M. Lopez                      June 5, 2018  
Rachel M. Lopez, CRR                  Date  
Official Court Reporter